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United Nations Commission on International Trade Law

Report on the work of the thirty-second session (17 May-4 June 1999)

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Introduction

1. The present report of the United Nations Commission on International Trade Law covers the Commission's thirty-second session, held at Vienna from 17 May to 4 June 1999.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the Assembly and is also submitted for comments to the United Nations Conference on Trade and Development.

Chapter I

Organization of the session

A. Opening of the session

3. The United Nations Commission on International Trade Law (UNCITRAL) commenced its thirty-second session on 17 May 1999. The session was opened by the Secretary of the Commission, on behalf of the Under-Secretary-General for Legal Affairs, the Legal Counsel.

B. Membership and attendance

4. The General Assembly, by its resolution 2205 (XXI), established the Commission with a membership of 29 States, elected by the Assembly. By its resolution 3108 (XXVIII) of 12 December 1973, the Assembly increased the membership of the Commission from 29 to 36 States. The current members of the Commission, elected on 28 November 1994 and on 24 November 1997, are the following States, whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated:[1]

> Algeria (2001), Argentina (2004—alternating annually with Uruguay, starting 1998), Australia (2001), Austria (2004), Botswana (2001), Brazil (2001), Bulgaria (2001), Burkina Faso (2004), Cameroon (2001), China (2001), Colombia (2004), Egypt (2001), Fiji (2004), Finland (2001), France (2001), Germany (2001), Honduras (2004), Hungary (2004), India (2004), Iran (Islamic Republic of) (2004), Italy (2004), Japan (2001), Kenya (2004), Lithuania (2004), Mexico (2001), Nigeria (2001), Paraguay (2004), Romania (2004), Russian Federation (2001), Singapore (2001), Spain (2004), Sudan (2004), Thailand (2004), Uganda (2004), United Kingdom of Great Britain and Northern Ireland (2001), United States of America (2004) and Uruguay (2004—alternating annually with Argentina, starting 1999).

5. With the exception of Algeria, Fiji, Kenya and Uganda, all members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Armenia, Azerbaijan, Belarus, Belgium, Bolivia, Canada, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Gabon, Georgia, Greece, Guinea, Holy See, Indonesia, Kuwait, Lebanon, Malaysia, Morocco, Namibia, Poland, Republic of Korea, Saudi Arabia, Slovakia, South Africa, Sweden, Switzerland, Tunisia, Turkey, Ukraine, Venezuela and Yemen.

7. The session was also attended by observers from the following international organizations:

(a) **United Nations system**

Economic Commission for Europe
United Nations Industrial Development Organization
International Monetary Fund

(b) **Intergovernmental organizations**

Asian-African Legal Consultative Committee
Asian Clearing Union
International Institute for the Unification of Private Law
Permanent Court of Arbitration

(c) **International non-governmental organizations invited by the Commission**

Foundation for Democracy in Africa
International Chamber of Commerce
International Council for Commercial Arbitration
International Federation of Commercial Arbitration Institutions
International Federation of Insolvency Professionals
International Maritime Committee
Pan-American Surety Association
Society for Worldwide Interbank Financial Telecommunication S.C.
World Association of Former United Nations Interns and Fellows

8. The Commission was appreciative of the fact that international non-governmental organizations that had expertise regarding the major items on the agenda of the current session had accepted the invitation to take part in the meetings. Being aware that it was crucial for the quality of texts formulated by the Commission that relevant non-governmental organizations should participate in the sessions of the Commission and its Working Groups, the Commission requested the Secretariat to continue to invite such organizations to its sessions based on their particular qualifications.

C. Election of officers[2]

9. The Commission elected the following officers:

Chairman:	Mr. Reinhard G. Renger (Germany)
Vice-Chairmen:	Mr. Antonio Paulo Cachapuz de Medeiros (Brazil) Mr. Dumitru Mazilu (Romania) Mr. Abubakr Salih Mohamed Nur (Sudan)
Rapporteur:	Ms. Shahnaz Nikanjam (Islamic Republic of Iran)

D. Agenda

10. The agenda of the session, as adopted by the Commission at its 651st meeting, on 17 May 1999, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Privately financed infrastructure projects.
5. Electronic commerce.
6. Receivables financing: assignment of receivables.
7. Monitoring implementation of the 1958 New York Convention.
8. International commercial arbitration: possible future work.
9. Case law on UNCITRAL texts (CLOUT).
10. Training and technical assistance.
11. Status and promotion of UNCITRAL legal texts.
12. General Assembly resolutions on the work of the Commission.
13. Coordination and cooperation.
14. Other business.
15. Date and place of future meetings.
16. Adoption of the report of the Commission.

E. Adoption of the report

11. At its 675th meeting, on 4 June 1999, the Commission adopted the present report by consensus.

Chapter II

Privately financed infrastructure projects

A. Background

12. At its twenty-ninth session, in 1996, after consideration of a note by the Secretariat on build-operate-transfer and related types of projects (A/CN.9/424), the Commission decided to prepare a legislative guide to assist States in preparing or modernizing legislation relevant to those projects.[3] The Commission requested the Secretariat to review issues suitable for treatment in such a legislative guide and to prepare draft materials for consideration by the Commission.

13. At its thirtieth session, in 1997, the Commission considered an annotated table of contents setting out the topics proposed for inclusion in the legislative guide (A/CN.9/438). The Commission also considered initial drafts of chapter I, "Scope, purpose and terminology of the guide" (A/CN.9/438/Add.1), chapter II, "Parties and phases of privately financed infrastructure projects" (A/CN.9/438/Add.2), and chapter V, "Preparatory measures" (A/CN.9/438/Add.3). After an exchange of views on the nature of the issues to be discussed and possible methods for addressing them in the guide, the Commission generally approved the line of work proposed by the Secretariat, as contained in those documents.[4] The Commission requested the Secretariat to seek the assistance of outside experts, as required, in the preparation of future chapters, and invited Governments to identify experts who could be of assistance to the Secretariat in that task.

14. At its thirty-first session, in 1998, the Commission had before it revised versions of the earlier chapters, as well as initial drafts of additional chapters, which had been

prepared by the Secretariat with the assistance of outside experts and in consultation with other international organizations. The documents included a revised table of contents (A/CN.9/444) and a draft of the introduction to the legislative guide (A/CN.9/444/Add.1), which combined, with amendments, the contents of documents A/CN.9/438/Add.1 and 2. Further documents included initial drafts of chapter I, "General legislative considerations" (A/CN.9/444/Add.2), chapter II, "Sector structure and regulation" (A/CN.9/444/Add.3), chapter III, "Selection of the concessionaire" (A/CN.9/444/Add.4), and chapter IV, "Conclusion and general terms of the project agreement" (A/CN.9/444/Add.5). The Commission considered various specific suggestions concerning the draft chapters, as well as proposals for changing the structure of the legislative guide and reducing the number of chapters.[5] The Commission requested the Secretariat to continue the preparation of future chapters, with the assistance of outside experts, for submission to the Commission at its thirty-second session.

15. At the current session, the Commission had before it the complete draft of the legislative guide, which consisted of the following: "Introduction and background information on privately financed infrastructure projects", and chapters I, "General legislative considerations", II, "Project risks and government support", III, "Selection of the concessionaire", IV, "The project agreement", V, "Infrastructure development and operation", VI, "End of project term, extension and termination", VII, "Governing law", VIII, "Settlement of disputes" (A/CN.9/458/Add.1-9, respectively). The Commission was informed that the Secretariat had changed the overall structure of the legislative guide and combined some of its chapters.

16. Concern was expressed that not all of the documents relating to the draft legislative guide were available in every official language prior to the commencement of the Commission's session. The Secretariat was requested to take the necessary measures to ensure the consistency and technical accuracy of the various language versions of the legislative guide.

B. General remarks

17. The Commission expressed its satisfaction with the progress of the work of preparation of the legislative guide. The draft guide was viewed as being of particular interest to those countries that strove to attract foreign investment capital in order to finance such projects. The Commission noted, however, the importance of keeping the appropriate balance between the objective of attracting private investment for infrastructure projects and the protection of the interests of the host Government and the users of the infrastructure facility.

18. The Commission noted and generally approved the structure of the draft legislative guide, as set out in document A/CN.9/458. It was observed that it was the first occasion on which the draft guide was available in its entirety. While it was generally felt that the draft chapters covered most of the central issues pertaining to privately financed infrastructure projects, the view was expressed that the document was rather lengthy and that adjustments were necessary in order to make the guide more accessible to the intended readers.

19. The Commission also noted the revised style and presentation of the legislative recommendations, so as to reflect the notion of concise legislative principles, to which the Commission had referred at its thirty-first session.[6] The Commission was reminded of the need to draft the guide so that it would be useful for those to whom it would be directed. It was noted that the legislative guide would constitute a useful tool for Governments in reviewing and modernizing their legislation pertaining to privately financed infrastructure projects. It was suggested, however, given the legal culture unique to each State, that the guide should identify and elaborate various issues and then provide a range of alternative policy options. It was pointed out that, depending on the legal tradition of the host country, the issues discussed in the legislative guide might be addressed in more than one legislative instrument. Furthermore, in some countries, no legislative action might be needed in connection with a number of the issues dealt with in the guide. In order to take into account the various options available to host countries, it was suggested that the guide should include model legislative clauses, as appropriate.

20. However, various representatives pointed out the potential difficulty and undesirability of formulating model legislative provisions on privately financed infrastructure projects in the light of the complexity of the legal issues typically raised by those projects, some of which concerned matters of public policy, as well as the diversity of national legal traditions and administrative practices. It was further pointed out that, as currently formulated, the draft chapters of the legislative guide offered the necessary

flexibility for national legislators, regulators and other authorities to take into account the local reality when implementing, as appropriate, the legislative recommendations contained therein.

21. Having noted the various views expressed, it was felt that the Commission should keep under consideration the desirability of formulating model legislative provisions, when discussing the legislative recommendations contained in the draft chapters, and in this connection identify any issues for which the formulation of model legislative provisions would increase the value of the guide (see below, paras. 40-43). Regardless of the final decision that might be taken by the Commission in that regard, it was agreed that the legislative recommendations contained in each chapter needed to be reformulated for greater uniformity. The Commission agreed that the Secretariat, with the assistance of experts, should review the recommendations in their entirety, so as to make them more coherent and consistent with one another.

C. Consideration of draft chapters

Introduction and background information on privately financed infrastructure projects (A/CN.9/458/Add.1)

22. An earlier draft of the introduction (A/CN.9/444/Add.1) had been considered by the Commission at its thirty-first session.[7]

23. The Commission considered various proposals for restructuring the introduction. It was suggested that, for ease of reading, the purpose of the legislative guide could be more clearly stated if the introduction were preceded by a short description of privately financed infrastructure projects, of the special characteristics of those projects and their modes of financing, as well as the historical background against which they were being carried out. This might be achieved by adding short introductory remarks to the existing introduction, which might draw on the substance of paragraphs 54 to 59 thereof. The introduction might then be given a different title, such as "Scope, definitions and background information on privately financed infrastructure projects".

24. Another suggestion, which gathered the support of various representatives, was that there was no need to add a separate introductory portion of new text, and that the purpose of the guide could be further clarified by reorganizing the various portions of the introduction, which should be retained with its current title. In particular, it was suggested that paragraphs 54 to 56 should be moved before section A of the introduction, which should be followed by the historical background information contained in paragraphs 57 to 82 and by the current sections B, C, D and E in that order.

Section A. Purpose and scope of the guide

25. It was suggested that the purpose of the legislative guide might be more clearly conveyed by making reference, in the current section A, to the central requirements for, and objectives of, privately financed infrastructure projects from the perspective of both the public and the private sectors. They included, from the perspective of the private sector, elements such as the need for certainty, stability and transparency, investment protection provisions and appropriate guarantees against inappropriate interference by the contracting authority. From the perspective of the public sector, central concerns were the need to ensure the continuity of the service, the observance of environmental and safety standards, adequate monitoring of the project performance and the possibility of revoking a concession when applicable requirements were not met. Cross-references should be added, as appropriate, to the subsequent portions of the guide where those matters were dealt with in more detail.

26. For the purpose of clarifying the relationship between the legislative recommendations and the accompanying notes, the Commission decided to insert after paragraph 2 of the introduction language along the following lines:

> "Each chapter of the guide is divided into legislative recommendations ("recommendations") and notes on legislative recommendations ("notes"). The recommendations contain a set of recommended legislative principles. The notes offer an analytical introduction with references to financial, regulatory, legal, policy and other issues raised in the subject area. The notes provide background information to enhance the understanding of the recommendations."

Section B. Terminology used in the guide

27. The view was expressed that the notion of "public infrastructure" was not adequately defined in paragraph 6, since it was linked to the notion of "public services", which, in turn, was defined in paragraph 8 by a reference to "public infrastructure". That situation, it was said, reflected the difficulty of formulating a definition of

"public services", a notion which might be differently understood in various legal systems. It was suggested that, in revising the introduction, the Secretariat should consider alternative ways of describing the types of infrastructure and services covered by the guide.

28. It was suggested that the terminology used in the various language versions of the guide should be reviewed so as to ensure that the expressions mentioned in paragraph 15 to refer to public authorities of the host country were consistently used throughout the guide.

Section C. Forms of private sector participation in infrastructure projects

29. The paragraphs dealing with the forms of private sector participation did not elicit comments.

Section D. Financing structures and sources of financing for infrastructure projects

30. As a general comment, it was noted that section D, which dealt with financing structures and sources of financing, was closely related to both chapter II, which covered project risks and government support, and section B.1 of chapter IV, which dealt with the financial arrangements in the project agreement. It was suggested that the link between those portions of the guide should be established more clearly, for example by combining the various portions of the guide dealing with financial matters into one single chapter.

31. The view was expressed that the notion of "project finance", as described in paragraphs 27 to 30, could be further clarified by elaborating on the differences between project finance and more traditional financing transactions. It was pointed out that the differences between the two financing techniques were not primarily based on whether or not guarantees by, or recourse to, the borrower's shareholders were available. In traditional financing, the lenders relied on the borrower's established credit and the borrower's established balance sheet, and it was the absence of such an established credit or balance sheet that made project finance the preferred financing modality for most projects involving the development of new infrastructure. Paragraphs 27, 28 and 30 should therefore be adjusted to reflect those circumstances.

32. It was noted that paragraphs 31 to 41 had a double purpose: on the one hand, they identified possible sources of financing for privately financed infrastructure projects; on the other hand, those paragraphs described various types of finance that might be mobilized for those projects. It was suggested that those paragraphs should also mention other types of financing such as leasing, commercial paper, guarantees or insurance companies' support agreements. It was also suggested that, in addition to referring to export credit agencies, paragraph 41, as well as other portions of the text dealing with similar issues, should mention political risk coverage provided by agencies that promoted investment of their nationals in foreign countries.

33. In connection with the notion of combined public and private finance, which was mentioned in paragraph 43, the view was expressed that the guide should avoid the impression that the availability of public funds or subsidies for financing infrastructure projects, where that was the case, entailed the assumption by the public sector of risks which, by the very nature of privately financed infrastructure projects, should be borne by the private sector. It was pointed out that, in some legal systems, it was an essential feature of transactions of the type covered by the guide that they were carried out by the concessionaire at its own risk.

Section E. Main parties involved in implementing infrastructure projects

34. As to paragraph 47, it was suggested that the notion of "project sponsors" might be misleading, since the term "sponsor" was used in some legal systems not to refer to private entities promoting the project but to the governmental agencies that had the overall responsibility for the implementation of privately financed infrastructure projects. It was suggested either to use other terms instead of "sponsors" or to adjust the text to avoid the possibility of such a misunderstanding. It was also suggested that the last sentence of paragraph 47 should refer to the fact that the project company was often required to be established under the laws of the host country.

35. It was suggested that paragraph 49 should refer not only to the negotiation of inter-creditor agreements, but also to the possibility that the lenders would negotiate a common loan agreement.

Section F. Infrastructure policy, sector structure and competition

36. The first sentence of paragraph 61 was felt to convey a categorically negative judgement about infrastructure monopolies, in particular in some language versions. It was proposed that that sentence should be redrafted so as to

avoid the impression that the guide took a position of principle in a matter considered to involve issues of domestic policy.

37. The question was asked whether the last sentence of paragraph 66, which appeared to have a prescriptive connotation, might be deleted. In reply, it was pointed out that the sentence in question merely referred to one of the interests taken into account by developing countries when considering the desirability of opening certain infrastructure sectors to competition, and that it reflected a suggestion that had been made at the Commission's thirty-first session.[8]

38. The view was expressed that paragraph 82, in particular its second sentence, seemed to advocate the privatization of infrastructure operators in order for a country to effectively reform its infrastructure sector. It was suggested that that sentence should be deleted and the remainder of the paragraph should be redrafted accordingly.

Chapter I. General legislative considerations (A/CN.9/458/Add.2)

General remarks

39. The Commission noted that an earlier draft of chapter I had been contained in document A/CN.9/444/Add.2. The Commission also noted that section D of the current draft chapter I incorporated the substance of some portions of former chapter II, "Sector structure and regulation" (A/CN.9/444/Add.3), that dealt with organizational and administrative matters pertaining to the functioning of regulatory bodies, following the Commission's decision at its thirty-first session to delete the earlier chapter II and to move the substance of the discussion contained therein to other chapters of the guide.[9]

40. By way of a general comment, it was suggested that the number of legislative recommendations contained in the guide should be reduced and that the recommendations should be limited to matters of a clear legislative nature. The view was also expressed that some of the legislative recommendations were more of a descriptive nature and should more appropriately be included in the notes. The Commission agreed that the guide should not contain an excessive number of legislative recommendations, and that that objective should be borne in mind by the Commission when considering individual chapters of the guide.

41. The Commission engaged in a discussion concerning the style of the legislative recommendations. According to one view, which was endorsed by various representatives, the style of the legislative recommendations was excessively cautious, and stronger language should be used in formulating them. It was pointed out that, in many instances, the advice contained in the accompanying notes was formulated in stronger terms than the recommendations themselves.

42. In response to those views, it was observed that, at the thirty-first session of the Commission, the Secretariat had been requested to draft the legislative recommendations in the form of "concise legislative principles",[10] and that the preference had been expressed for the use of flexible, rather than imperative, language.

43. After consideration of the various views expressed, it was generally agreed that it was not the purpose of the guide to impinge upon national sovereignty or to be overly prescriptive on the contents of domestic legislation. Nevertheless, the Commission generally felt that it would be appropriate to formulate its recommendations in stronger terms. It was also agreed that possible options for formulating the legislative recommendations could be considered in the course of their review by the Commission, bearing in mind the need for ensuring the greatest possible uniformity in that regard.

44. With regard specifically to draft chapter I, the proposal was made that the draft chapter should outline the general principles that should inspire a domestic legislative framework for privately financed infrastructure projects, in particular the principles of transparency, fairness, openness and competition.

45. It was pointed out that the question of the law governing the implementation of privately financed infrastructure projects was logically related to the issues discussed in the draft chapter. The question was thus asked whether draft chapter VII, "Governing law" (A/CN.9/458/Add.8), could be shortened and combined with draft chapter I. In response, it was observed that an earlier version of chapter I (A/CN.9/444/Add.2) had contained, in its sections B and C, a discussion on the possible impact of other areas of legislation on the successful implementation of privately financed infrastructure projects and the possible relevance of international agreements entered into by the host country for domestic legislation on those projects. That discussion had been expanded so as to accommodate various proposals that had been made at the thirty-first session of the Commission,[11] and, for ease of reading, it had

been moved to draft chapter VII, "Governing law" (A/CN.9/458/Add.8).

46. The Commission considered that the various language versions of the next draft legislative guide should be carefully reviewed so as to ensure terminological accuracy and consistency. Representatives were called upon to provide to the Secretariat suggestions for terminological improvements of the draft guide.

General considerations (legislative recommendation 1 and paras. 1-15)

47. The view was expressed that the first sentence of legislative recommendation 1 was not sufficiently precise as to what powers were needed by the contracting authority to award infrastructure projects. It was also observed that the contracting authorities had not been identified in recommendation 1. It was therefore suggested that the recommendation needed to be further clarified.

48. In response, it was noted that the question of who had the authority to award infrastructure projects depended on the constitutional organization, legal tradition and administrative structure of the country concerned, and that it might not be feasible to formulate legislative recommendation 1 in more precise terms without describing the complexities of the internal structure and competence of the contracting authorities in various countries. It was suggested that a general reference to the authorized agencies, such as what was contained in paragraphs 17 and 18 of the notes, might be sufficient for the purposes of the draft chapter.

49. The Commission agreed that, for purposes of clarity, the phrase "with or without such conditions as may be deemed appropriate" should be added to the first sentence in legislative recommendation 1. For the same reason, the Commission further agreed to add the words "or reviewing" after the words "setting up" in paragraph 1 of the notes.

50. In connection with the second sentence of legislative recommendation 1, the view was expressed that it would not be appropriate for the guide to recommend the review of constitutional provisions, which was a politically sensitive process in many countries. The concern was also expressed that a revision or amendment of a State constitution, as indicated in legislative recommendation 1, was a complicated procedure, which might not be necessary to achieve the legislative purposes outlined in the guide. The objective outlined therein, namely to encourage private sector investment, was actually a matter of administrative, rather than constitutional law. It was suggested that, instead, reference should be made only to a review of legislative provisions. Following the same line of thought, it was also suggested that, as currently formulated, the second sentence of legislative recommendation 1 should more appropriately be included in the notes.

51. In response to those concerns, it was pointed out that the guide was addressed to legislators and policy makers in countries interested in promoting private investment in infrastructure projects. The guide itself did not advocate the opening of infrastructure sectors to private investment, but merely provided advice to legislators and policy makers concerning relevant legislative issues for those countries which had made a policy decision to attract private investment to infrastructure projects. The purpose of the reference, in legislative recommendation 1, to a review of constitutional provisions was to draw the reader's attention to the need for identifying potential legal difficulties for the implementation of privately financed infrastructure projects.

52. The suggestion was made that the last sentence of paragraph 10 should be redrafted so as to make it clear that the guide did not advise against detailed sector-specific legislation as such, but only legislation that contained excessively detailed provisions on the content of the contractual arrangements between the contracting authority and the concessionaire.

53. In connection with paragraphs 12 to 15, a number of questions were raised concerning the mention of a "special legal regime" applying to privately financed infrastructure projects in some legal systems. In particular, it was suggested that the power or right of a Government to revoke or modify a contract, for reasons of public interest, raised a number of issues. The view was expressed that the financing of infrastructure projects required a stable and predictable environment and that, in the interest of attracting investment capital, Governments would be well advised to restrain the power to revoke or modify the contract. It was suggested that Governments might wish to adopt legislation that minimized the power of a Government to interfere once a contract had been concluded. It was felt that the guide should avoid the impression that, by referring to the existence of such special prerogatives in some legal systems, it impliedly endorsed their exercise. Moreover, the guide should make it clear that the contractor was entitled to reasonable,

proper compensation in case of losses due to governmental action revoking or modifying the contract.

54. In response, it was observed that paragraphs 13 and 15 adequately reflected, in a summary fashion, some of the essential features of the legal regime governing privately financed infrastructure projects under some legal systems. It was pointed out that, in those legal systems, the contracting authority had, by virtue of general rules applicable to administrative contracts, even where the contract remained silent on the point, exceptional prerogatives which it could not legally waive. Those prerogatives included, as mentioned in paragraph 13, the power to alter the terms of administrative contracts or to terminate those contracts or request their rescission by a judicial body, for reasons of public interest. Those extraordinary prerogatives were justified by the administration's duty to act in the public interest. The exercise of such prerogatives, besides being in no way arbitrary and being in any case subject to judicial control, imposed binding obligations on the administration, especially to ensure the continuity of public services or to compensate the concessionaire for the loss incurred with the modification or termination of the contract. Since later chapters of the guide (e.g. chapter V, "Infrastructure development and operation", and chapter VI, "End of project term, extension and termination") dealt with the legal consequences of the exercise of such special prerogatives by the contracting authority, the concerns that had been expressed might be addressed by adding appropriate cross-references in paragraph 13.

Scope of authority to award concessions (legislative recommendation 2 and paras. 16-25)

55. It was observed that the language used in the chapeau of the legislative recommendation was unnecessarily cautious. It was suggested that the words "may wish to consider" in the chapeau be replaced by "should consider".

56. The suggestion was made that legislative recommendation 2 (b) should be expanded so as to reflect the fact that, in some legal systems, the legal regime governing concessions included principles of law that had been developed by jurisprudence.

57. The Commission agreed that paragraph 16 needed to be revised so as to clarify the meaning of the expression "decentralized entities".

58. In connection with paragraph 17, it was suggested that in some countries it might not be feasible to describe positively the scope of authority to award concessions, and that the guide should refer to the technique used in some countries of circumscribing such authority by identifying the fields of activity where no concessions might be awarded (e.g. activities related to national defence and security).

Administrative coordination (legislative recommendation 3 and paras. 27-32)

59. It was suggested that in legislative recommendation 3 (a) a reference should be included to the preparation by the contracting authority of studies that identified the expected output of the project, provided sufficient justification for the investment, proposed a modality of private sector participation, and described a particular solution to the output requirement. Such a study was referred to in the contracting practice of some countries as a "business case".

60. It was also suggested that legislative recommendation 3 (a) should refer to the need for carrying out studies on the expected impact of the proposed project on the particular infrastructure sector and, as appropriate, on other infrastructure sectors.

61. It was agreed to insert the words "construction and" before the word "operation" in legislative recommendation 3 (b).

62. The Commission was advised that recent international experience had demonstrated the usefulness of establishing a central unit within the host country's administration, with overall responsibility for formulating policy and providing practical guidance on privately financed infrastructure projects and coordinating the input of the main governmental bodies that would interface with the project company. It was suggested that a recommendation to that effect might be included in legislative recommendation 3.

63. With respect to the distribution of administrative authority among various levels of government, which was mentioned in paragraph 32, it was suggested that the text should be made stronger in urging countries to coordinate their efforts in the various governmental areas and levels.

Authority to regulate infrastructure services (legislative recommendations 4 and 5 and paras. 33-55)

64. It was suggested that recommendation 4 should provide that decisions by any regulatory body had to be

taken pursuant to rules of law governing transparency in the public administration.

65. It was pointed out that the notion of independence and autonomy of regulatory bodies, as contemplated in legislative recommendation 4 (b), involved two main aspects: independence vis-à-vis the host country's Government, and independence from the regulated industry. It was suggested that the second part of legislative recommendation 4 (a), which mentioned one of the requirements for the independence of regulatory bodies, should be combined with legislative recommendation 4 (b).

66. On the same issue, it was also pointed out that different legal systems provided for various forms of relief, including administrative review, and that the reference to "appeal procedures" in legislative recommendation 5 (b) should not be understood as limiting such relief to judicial proceedings.

67. Still in connection with legislative recommendation 5 (b), it was noted that recent developments in the law of some countries had led to an expansion of the scope of relief against regulatory decisions so as to recognize the rights of some third parties, such as consumers or users of the facility, to appeal regulatory decisions that adversely affected their rights. It was suggested that legislative recommendation 5 (c) should be expanded accordingly.

68. The view was expressed that clarifying the appellate procedures, be they administrative, arbitration or judicial, might help in attracting private investment for public infrastructure projects. The guide should emphasize the need for timeliness in the decision-making process by regulatory bodies.

69. It was pointed out that the possibility of subcontracting to outside experts certain regulatory tasks, which was referred to in paragraph 48, was not an appropriate solution in every situation, particularly in those countries where few resources were available. Caution was needed to avoid potential conflicts of interest. It was agreed that the last sentence of paragraph 48 should be deleted.

Chapter II. Project risks and government support (A/CN.9/458/Add.3)

General remarks

70. Pursuant to one view, the considerations relating to the risks encountered in privately financed infrastructure projects and the common contractual solutions for risk allocation, currently set out in section B of the draft chapter, were logically related to the financial arrangements for the execution of infrastructure projects, which were dealt with in other portions of the guide, namely in section D of the introduction (A/CN.9/458/Add.1) and in section B.1 of chapter IV, "The project agreement" (A/CN.9/458/Add.5). It was therefore suggested that the discussion of those issues should be combined into one new chapter concerning the financial arrangements for privately financed infrastructure projects.

71. By the same token, it was pointed out that section C of the draft chapter, which set out policy considerations of the Government on direct government support and discussed some additional support measures, as well as sections D and E, which outlined guarantees and support measures that might be provided by international and bilateral financial institutions, were closely related to the contractual arrangements for the implementation of privately financed infrastructure projects. It was suggested that sections C to E might thus be incorporated into chapter IV.

72. Another view, which gathered wide support, was that a separate chapter dealing with issues of project risks and government support was useful to help the reader focus on the importance of achieving an effective allocation of project risks in order to ensure the successful implementation of privately financed infrastructure projects. It was also pointed out that the level of government support available to privately financed infrastructure projects might be determined for individual infrastructure sectors, and not only for individual projects. Thus, it would not be desirable to regard the relevant discussion in the draft chapter as dealing with purely contractual issues.

73. Although there was general agreement to retain the draft chapter, it was felt that the link between the issues discussed therein and the financial considerations set out elsewhere in the guide might be established more clearly in the draft chapter. One possible way of achieving that result might be to insert in the draft chapter a short section highlighting the particular requirements of project financing in terms of project risks and risk allocation.

74. It was proposed that after paragraph 2 of the notes to the legislative recommendations, language along the following lines should be added:

> "In the past, debt financing for infrastructure projects was obtained on the basis of credit support from

project sponsors, multilateral and national export credit agencies, Governments and other third parties. In recent years, these traditional sources have not been able to meet the growing needs for infrastructure capital and financing has been increasingly obtained on a project finance basis.

"Project finance, as a method of financing, seeks to establish the creditworthiness of the project company on a 'stand-alone' basis, even before construction has begun or any revenues have been generated, and to borrow on the basis of that credit. Commentators have observed that project finance may hold the key to unlocking the vast pools of capital theoretically available in the capital markets for investment in infrastructure. However, project finance has distinctive and demanding characteristics from a financial point of view. Principal among these is that, in a project finance structure, financing parties must rely mainly upon the project company's assets and cash flows for repayment. If the project fails they will have no recourse, or only limited recourse, to the financial resources of a sponsor company or other third party for repayment.

"The financial methodology of project financing requires a precise projection of the capital costs, revenues and projected costs, expenses, taxes and liabilities of the project. In order to predict precisely and with certainty these numbers, and to create a financial model for the project, it is typically necessary to project the "base case" amounts of revenues, costs and expenses of the project company over a long period—often 20 years or more—in order to determine the amounts of debt and equity the project can support. Central to this analysis is the identification and quantification of risks. For this reason, the identification, assessment, allocation and mitigation of risks is at the heart of project financing from a financial point of view.

"Among the most important, yet difficult, risks to assess and to mitigate are 'political risk' (the risk of adverse actions of the host Government, its agencies and its courts, particularly in licensing and permitting, regulation applicable to the project company and its markets, taxation, and in the performance and enforcement of contractual obligations) and 'currency risk' (the risk of the value, transferability and convertibility of the local currency). For these risks, in particular, project finance structures have often incorporated insurance or guarantees of multilateral and export credit agencies as well as host Government guarantees."

75. The Commission generally agreed with the substance of the proposed addition and requested the Secretariat to consider the most appropriate place for inserting the new text (i.e. whether in the draft chapter or in the introduction to the legislative guide). The Commission further agreed that a text along the following lines should be inserted, at an appropriate place, in the draft chapter:

> "Other chapters of this guide deal with related aspects of the host Government legal regime which are of relevance to the credit and risk analysis of a project. Depending upon the sector and type of project the emphasis will, of course, vary. The reader is referred in particular to chapters IV, 'The project agreement', V, 'Infrastructure development and operation', VI, 'End of project term, extension and termination', VII, 'Governing law' and VIII, 'Settlement of disputes'."

76. It was pointed out that the guide contained a large number of technical expressions used in business and financial practice, and it was agreed that the final text should contain a glossary of the technical terms used in the guide.

Project risks and risk allocation (legislative recommendation 1 and paras. 3-24)

77. The view was expressed that it was important for the contracting authority to have sufficient power to agree on an allocation of risks that suited the needs of the project, not only in its own view, but also taking into account the interests of all the parties involved. It was therefore agreed that the words "in the view of the contracting authority" should be deleted from legislative recommendation 1.

78. The suggestion was made that legislative recommendation 1 should also refer to the need for attracting capital for privately financed infrastructure projects. However, that suggestion did not attract sufficient support.

79. It was pointed out that paragraphs 6 to 15 referred largely to risks faced by the project company, but did not give sufficient attention to risks faced by the contracting authority. It was therefore agreed that paragraphs 6 to 15 should also mention risks specifically faced by the contracting authority, in particular risks related to the transfer of the infrastructure facility to the contracting authority at the end of the project term.

80. It was noted that paragraph 7 referred to the risk of project disruption due to unforeseen or extraordinary events outside the control of the parties, while paragraph 8 mentioned the risk that the project execution might be negatively affected by acts of the contracting authority, other governmental agencies or the host country's legislature. It was observed that, in some legal systems, there were well-established principles of law that dealt with those situations. For instance, in the situation referred to in paragraph 7, some legal systems placed the concessionaire under an obligation to continue providing the services despite the occurrence of the said unforeseen or extraordinary events, subject to some reasonable limits and to the provision of adequate assistance, financial or otherwise, by the contracting authority, including payment of adequate compensation for the additional cost incurred by the concessionaire. Furthermore, in the situation referred to in paragraph 8, some legal systems recognized that the concessionaire might be entitled to a varying level of compensation depending on whether the project execution was negatively affected by acts of the contracting authority itself, of other governmental agencies or the host country's legislature. Since neither paragraph 7 nor paragraph 8 indicated the legal consequences of the situations referred to therein, it was agreed that appropriate cross-references should be included to the subsequent portions of the guide where those matters were discussed in more detail.

81. It was suggested that, for purposes of clarity, the word "negotiators" in paragraph 17 should be replaced by the words "contracting authorities".

82. It was suggested that paragraph 18 should mention the fact that guarantees of performance provided by contractors and equipment suppliers were often complemented by similar guarantees provided by the concessionaire to the benefit of the contracting authority.

83. It was agreed that the reference to assurances against expropriation or nationalization, which were mentioned in paragraph 19, were not meant to suggest that the Government waived its sovereign right to acquire the project assets through expropriation or similar proceedings, provided that adequate compensation was paid in accordance with the rules in force in the host country and relevant rules of international law.

84. The view was expressed that the closing sentence of paragraph 24 contained an important warning to legislators in host countries about the undesirability of having in place statutory provisions that limited unnecessarily the negotiators' ability to achieve a balanced allocation of project risks. It was agreed that it would be useful to express the same idea more prominently in subsection B.2.

Government support (legislative recommendation 2 and paras. 25-56)

85. The Commission agreed that the word "indicating" in recommendation 2 did not sufficiently stress the need for clarity about the forms of support that might be provided by the Government of the host country and that the word "stating" should be used instead.

86. In view of the fact that the chapter described various forms of support by the Government, not all of which were of a financial nature, it was agreed that recommendation 2 and paragraph 26 should be adapted accordingly.

87. The view was expressed that the last sentence of paragraph 28, which cautioned against overcommitment of governmental agencies through guarantees given to specific projects, was unnecessary or otherwise should not be interpreted as any kind of intervention in the policies of host Governments. In response, it was observed that paragraph 28 contained valuable advice to legislators, which should be retained in the guide. It was noted that some countries with considerable experience in privately financed infrastructure projects had found it necessary to introduce appropriate techniques for budgeting for, or for assessing the total cost of, government support measures in order to avoid the risk of financial overcommitment of governmental agencies.

88. In connection with paragraph 31, it was pointed out that the host country's obligations under international agreements on regional economic integration or trade liberalization might also limit its ability to provide forms of support other than financial support to companies operating in their territories.

89. In response to a question concerning the purpose of, and the need for, paragraph 36, it was pointed out that in some countries the participation of the Government in a given project often raised an expectation that the Government would back the project fully or eventually take it over at its own cost if the project company failed, even though the Government might not be under a legal obligation to do so. The view was also expressed that the note of caution contained in paragraph 36 was useful, since equity participation might entail the transfer back to the Government of a share of project risks, and the loss of public funds, should the project company become insolvent, would inevitably have political consequences.

There was, however, general agreement that the meaning of paragraph 36 might need to be clarified further, in particular the reference to possible ways for the Government to protect itself against the risks mentioned therein. It was pointed out, in particular, that contractual provisions releasing the Government from any obligation to subscribe to additional shares in the event that the project company's capital needed to be increased might be contrary to national law in some jurisdictions.

90. In connection with paragraph 39, it was pointed out that it was also important to bear in mind, in addition to domestic competition laws, the host country's obligations under international agreements on regional economic integration or trade liberalization. These considerations, it was suggested, also applied to paragraphs 51 to 53.

91. The view was expressed that the expression "sovereign guarantees" in paragraph 40 did not reflect the substance of the subsection and that it might imply a reference to public international law, specifically with respect to State immunity. It was suggested that the use of that expression should be reconsidered.

92. It was suggested that paragraph 41 (a) should mention the situation where the expectations under an off-take agreement might not be met, as a result of the privatization of the governmental entity concerned.

93. The risk of exchange rate fluctuations, it was said, was ordinarily regarded as a commercial risk, as stated in paragraph 44. Nevertheless, it was suggested that in cases where the project company was unable to repay funds borrowed in foreign currencies due to extreme foreign exchange rate fluctuations, the foreign exchange risk might be regarded as a political risk. In practice, Governments had sometimes agreed to assist the project company in such cases.

94. In connection with paragraphs 51 to 53, the view was expressed that governmental undertakings aimed at protecting the concessionaire from competition might in some cases be inconsistent with the host country's obligations under international agreements on regional economic integration or trade liberalization, a circumstance which should be mentioned in the guide.

95. It was agreed that paragraph 68, as well as other relevant portions of the guide, should mention both export credit agencies and national development agencies. It was also agreed that the title of the subsection should read "Guarantees provided by export credit agencies and national development agencies".

96. Export credit agencies, it was said, usually guaranteed payment where the buyer, for whatever reason, could not make payment. In that sense, export credit agencies provided a type of insurance. For the purpose of clarifying the scope of guarantees provided by export credit insurance, it was agreed to add the words "In the context of the financing of privately financed infrastructure projects" at the beginning of paragraph 69 (a).

Chapter III. Selection of the concessionaire (A/CN.9/458/Add.4)

General considerations (legislative recommendation 1 and paras. 1-30)

97. It was agreed that the legislative recommendations expressed in chapter III were to be reviewed and adjusted as necessary so as to make sure that all advice in the notes that merited a legislative provision was appropriately included in the legislative recommendations, without, however, unnecessary reference in the recommendations to the administration of proceedings for the selection of a concessionaire.

98. Opinions were expressed favouring competitive methods for selecting the concessionaire, with appropriate adjustments that took into account the particular needs of privately financed infrastructure projects. Statements were made that adherence to competitive methods was necessary to counter improper practices and corruption as well as to obtain the best value for the host Government and the users of privately financed infrastructure facilities. It was suggested that the UNCITRAL Model Law on Procurement of Goods, Construction and Services, which was based on the notion of competition in public procurement, presented a suitable basis for devising selection procedures in privately financed infrastructure projects. It was said that the relationship between procurement methods under the Model Law and selection methods for privately financed infrastructure projects was such that it would be possible to refer in the legislative guide, whenever appropriate, to the Model Law and thereby to limit chapter III of the legislative guide to those provisions that should be different from those in the Model Law.

99. In response it was stressed, however, that in some countries, pursuant to their time-honoured tradition, privately financed infrastructure projects (which involved the delegation by a State entity of the right to provide a public service) were subject to a special legal regime that differed in many respects from the regime that applied generally to the public procurement of goods, construction

and services. That special legal regime placed the accent on the delegating body's freedom to choose the operator who best suited its needs, in terms of professional qualifications, financial strength, ability to ensure the continuity of the service, equal treatment of the users and quality of the proposal. However, freedom of negotiation did not mean arbitrary choice and the laws of those countries provided procedures to ensure transparency and fairness in the selection process.

100. The Commission, recalling its considerations at its previous session[12] and considering that the legislative guide should be useful worldwide, agreed with the substance of recommendation 1, subject to clarifying that the recommendation was to be implemented in accordance with the legal tradition of the State concerned.

Pre-selection of bidders (legislative recommendation 2 and paras. 39-56)

101. It was recalled that, while the pre-selection proceedings described in the recommendation resembled in some respects traditional pre-qualification proceedings in the procurement of goods and services, it was important to distinguish the two proceedings (in order to avoid the connotation of automatic qualification (or disqualification) that was inherent in the traditional pre-qualification proceedings). It was therefore confirmed that it was appropriate to use the expression "pre-selection proceedings" in the draft chapter.[13]

102. It was suggested that recommendation 2 should mention criteria for the pre-selection of bidders, just as recommendation 6 (d) contained criteria for evaluating proposals by bidders. Furthermore, it was said that the recommendation was somewhat incomplete in that it did not reflect all the requirements mentioned in paragraph 43; it should therefore be adjusted to reflect the substance of paragraph 43.

103. It was agreed to stress in the last sentence of paragraph 50 that it was necessary to announce in advance the intention to apply any domestic preferences in the pre-selection proceedings.

104. While some support was expressed for retaining recommendation 2 (d) (which envisaged giving to the contracting authority discretion to announce in the invitation to the pre-selection proceedings that the bidders would be compensated for costs incurred by them in preparing pre-selection documents if the project was prevented from proceeding for reasons outside their control), the prevailing view was that the recommendation should be deleted since in many countries such compensation was not envisaged. It was, however, agreed to keep paragraphs 51 and 52 of the notes, which provided useful information about this possibility. It was suggested to stress in the last sentence of paragraph 52 the need to announce the contracting authority's intention to compensate bidders in certain circumstances at an early stage, preferably in the invitation to the pre-selection proceedings.

Single-stage and two-stage procedure for requesting proposals (legislative recommendations 3-5 and paras. 58-64)

105. The Secretariat was requested to clarify (in the recommendations and in the accompanying notes) the differences in the following stages of the selection process: (a) the discussions between the contracting authority and bidders concerning the substance of proposals; (b) requests for clarifications that bidders might direct to the contracting authority; and (c) final negotiations as described in recommendation 12 and paragraphs 92 and 93. It was noted that such clarification might require some restructuring of the text.

Content of the final request for proposals (legislative recommendation 6 and paras. 65-74)

106. It was observed that one of the problems that frequently arose in practice was the excessively long time needed to award the project and negotiate the project agreement; in that connection, it was suggested that the importance of recommendation 6 (c) relating to the inclusion in the final request for proposals of the contractual terms of the project agreement should be emphasized. The presence and comprehensiveness of those terms in the final request would reduce the time needed for the conclusion of the project agreement and increase the transparency of the process.

107. The suggestion was made that recommendation 6 should reflect, with the necessary adjustments, the substance of recommendation 11 (b) (concerning the threshold with respect to quality and technical aspects of the proposals) and the substance of recommendation 12 (c) (concerning the terms of the contract that were designated as not negotiable). It was also suggested that paragraph 71 (e) should be aligned, in the language versions where necessary, with paragraph 84 (c). Furthermore, it was suggested that paragraph 73 should refer to chapter IV,

"The project agreement", which gave more guidance to the reader on matters outlined in the paragraph.

Clarifications and modifications (legislative recommendation 7 and paras. 75-76)

108. It was suggested that a clearer distinction should be made in paragraphs 75 and 76 between clarifications and modifications and to refer in recommendation 7 to the possibility of extending the deadline for submission of proposals in case of extensive amendments to the requests for proposals. As to recommendation 7 (b), it was widely recognized that it was important to provide for an obligation of keeping minutes of meetings of bidders convened by the contracting authority. Nevertheless, it was said that the legal consequences of a failure to prepare the minutes did not need to be addressed in the legislative guide and that those consequences might be left to other legal rules governing the conduct of the contracting authority. A suggestion was made that any failure to keep proper minutes should not necessarily lead to the conclusion that the selection was vitiated.

Contents of the final proposals (legislative recommendation 8 and paras. 77-82)

109. It was agreed that the expression "may wish" in recommendation 8 should be replaced by a stronger term; furthermore, the recommendation should make it clear that the final proposals should provide information on all relevant factors that allowed the contracting authority to establish the responsiveness of the proposal (including, e.g. the information required to assess the level of governmental support expected by the bidder; the bid security as explained in paragraphs 81 and 82; information regarding the quality of service; and all aspects of the environmental impact of the project). As to paragraph 79 (d), it was suggested that the bidders should be required to indicate the degree to which they were ready to assume "force majeure" types of risk, i.e. risks of financial consequences of unforeseen events.

Evaluation criteria (legislative recommendations 9 and 10 and paras. 83-86)

110. It was agreed that compliance with environmental standards (recommendation 9 (d)) was a requirement and should not be included as an evaluation criterion; to do so implied the possibility of deviation from those standards. It was decided to merge recommendation 9 (d) into recommendation 8.

111. It was proposed that, since it could not be assumed that pre-selection of bidders would be carried out in all cases, the recommendations should include a provision concerning the evaluation of the qualification of bidders.

112. It was noted that in the practice of some countries a new evaluation criterion had emerged according to which the host Government was able to assess the social impact or value of the project (e.g. benefits to underprivileged groups of persons or businesses), and it was suggested that the legislative guide recognize such a "social" criterion.

113. It was pointed out that the statement in paragraph 84 (b) requiring, where feasible, the transfer of technology during every phase of the project expressed a view that might not always be acceptable because of the exclusive rights that were characteristic of proprietary information. It was suggested that in paragraph 84 (c), the words "may include" should be replaced by "should include", and that the substance of the subparagraph should be moved into the legislative recommendations.

114. It was suggested that an expression along the lines of "proposed financial arrangements" should be included in paragraph 10 (b). It was also suggested that (among the costs to be considered in the financial proposals) the current value of maintenance costs should be added to paragraph 10 (c). Given the earlier acknowledgement that governmental support extended beyond financial support, it was agreed to adjust paragraph 10 (d) accordingly. Another criterion that was to be added to recommendation 10 concerned the extent of risk assumed by the bidder.

Submission, opening, comparison and evaluation of proposals (legislative recommendation 11 and paras. 87-91)

115. Referring to paragraphs 89 to 91, it was suggested that it was important to preserve a two-step evaluation process whereby non-financial criteria would be taken into consideration separately from, and perhaps before, financial criteria, so as to avoid situations where undue weight would be given to certain elements of the financial criteria (such as the unit price) to the detriment of the non-financial criteria. Support was expressed for that suggestion, without, however, endorsing the "two-envelope" system, according to which the contracting authority was to evaluate the technical elements of the proposal without being influenced by its price component.

116. In response to a question, it was clarified that subparagraphs (a), (b) and (c) of recommendation 11 were

not to be read as alternatives. After determining that a proposal was not responsive, it was not intended that the evaluation procedure would continue.

117. In response to a concern over possible duplication, it was explained that, whereas recommendation 8 described what the contracting authority could require in the proposal, recommendation 11 provided for the rejection of incomplete proposals that had not met such requirements.

118. The view was expressed that the provisions of paragraph 87, which stipulated that proposals received by the contracting authority after the deadline should not be opened, were too severe, and that such a situation required more detailed provisions. It was also suggested that, for the purpose of promoting transparency, paragraph 88 should include a provision that would require proposals to be opened in a public session. In response to those suggestions, it was suggested that such matters might best be left to the procurement laws of the country concerned.

119. In response to a question as to the relationship between the draft legislative guide and international rules of public procurement, such as those contained in agreements on government procurement concluded under the auspices of the World Trade Organization, it was explained that the matter was addressed in chapter VII, "Governing law". It was suggested that the Secretariat should seek comments from the World Trade Organization on draft chapter III of the legislative guide.

Final negotiations (legislative recommendation 12 and paras. 92-93)

120. It was pointed out that, whereas recommendation 12 outlined provisions for final negotiations between the contracting authority and the bidder that had submitted the most advantageous proposal, the contracting authority might have to negotiate with another bidder, if the first bidder would decide not to accept the contract. It was suggested that the recommendation should be revised to reflect that possibility. It was also suggested that in subparagraph (c) of the recommendation, the term "deemed" should be replaced by "designated".

Notice of project award (legislative recommendation 13 and para. 94)

121. No comments were made on recommendation 13 and paragraph 94 of the notes.

Direct negotiations (legislative recommendations 14 and 15 and paras. 95-100)

122. There was wide agreement that the principles of competition and transparency were critical to the objectives of the draft legislative guide and that, in the context of privately financed infrastructure projects, direct negotiations should be used in exceptional circumstances. It was noted, however, that in some countries direct negotiations were used and that, coupled with measures enhancing transparency, they produced satisfactory results. It was therefore agreed that paragraph 98 should be adjusted to reflect more accurately the practice and implications of direct negotiations in the selection of the concessionaire.

123. It was suggested that, as the list of exceptional circumstances authorizing direct negotiations was not exhaustive and raised issues on which national policies might differ, the list would be more appropriately included in the notes, rather than in recommendation 14. On a point of clarification as to the circumstances of urgency that would justify direct negotiations (recommendation 14 (a)), it was explained that interruption in the provision of services to the public might constitute one example. Reasons of national defence, cases where there was only one source capable of providing the required service, and overriding reasons of public interest were also viewed as circumstances under which direct negotiations were justifiable. As to recommendation 14 (c) (which allowed direct negotiations in the case of lack of experienced personnel or of an adequate administrative structure), it was said that that circumstance should not constitute a reason permitting direct negotiations because the selection process would remain prone to abuse. Hiring consultants and advisers to assist in carrying out the selection was said to be the appropriate practical solution in such a case. The contrary view, however, was that lack of experienced personnel was a real problem for some Governments which ought to be taken into account in devising legislative provisions on the selection of the concessionaire. Support was expressed for the suggestion that lack of experienced personnel should not constitute an exception that might be resorted to on a case-by-case basis.

124. Caution was advised as to recommendation 15 and the notes in paragraph 100, which allowed, after a competitive selection procedure had been initiated, changing the selection method in favour of direct negotiations. Since such a change was prone to abuse, it was said that the conditions for the change should be expressed more

restrictively and subject to specific requirements of transparency such as an announcement in the initial request for proposals.

Measures to enhance transparency in direct negotiations (legislative recommendation 16 and paras. 101-107)

125. It was suggested that a provision should be included in the recommendation that would require a written justification wherever there had been a divergence from competitive principles. Other suggestions were to include a requirement that the project agreement should be open to public inspection and to require publication of the award. It was pointed out that the requirement to maintain a record of the selection proceedings, described in paragraph 107, was not reflected in the recommendation. It was considered that subparagraph (g) of the recommendation was self-evident and could be deleted.

126. It was suggested that the importance of the need to maintain confidentiality should be stressed in the notes. It was also pointed out that, after the bidding process or direct negotiations had been completed, and after the information had entered the public domain, confidentiality requirements in respect of certain parts of that information would end.

127. It was pointed out that the term "direct negotiations" rather than "negotiations" had to be used consistently throughout the recommendation and accompanying notes.

128. It was pointed out that there was an inconsistency between the title of recommendation 16 and the contents, which extended to matters beyond measures to enhance transparency, such as measures to maintain confidentiality. Another suggestion was to revise recommendation 16 in the same manner as recommendation 14 by including the list of examples in the notes. It was decided to delete the title of recommendation 16 and leave the recommendation under the overall title "Direct negotiations".

129. One view was that it was inadvisable to include in paragraph 101 a statement that in some countries procurement laws allowed contracting authorities virtually unrestricted freedom to conduct negotiations as they saw fit, as such a statement might be misunderstood as an endorsement. The opposing view regarded the statement as being merely a description of practice and therefore acceptable.

Unsolicited proposals (legislative recommendations 17-20 and paras. 108-128)

130. It was observed that in a number of countries no special procedures existed for dealing with unsolicited proposals and that, as a consequence, such unsolicited proposals were in those countries treated in accordance with the procedures applicable generally for awarding public infrastructure projects. A suggestion was therefore made that, from the perspective of those countries, there might be no need for the elaborate treatment of unsolicited proposals as had been suggested in the current version of the draft chapter. The Commission, however, recalling its discussion at its thirty-first session,[14] considered that unsolicited proposals were in the interest of States and that it was therefore useful to suggest procedures for dealing with them in order, on the one hand, to attract such proposals and, on the other hand, to ensure that projects were awarded on optimal conditions.

131. It was suggested that the usefulness and clarity of recommendation 17 would be improved if it would be stated in the recommendation that unsolicited proposals were to be dealt with in accordance with the procedures established in the law (those procedures were suggested and commented upon in subsequent recommendations 18 to 20).

132. A proposal was made that an additional recommendation should be included at an appropriate place to the effect that the contracting authority, after awarding a project based on an unsolicited proposal, was obliged to publish a notice of the award.

133. As to recommendation 20 (b), it was suggested that it should be specified that "the summary of the essential terms of the proposal" to be given to other interested parties should, to the extent possible, be limited to the "output" elements of the proposal (e.g. capacity of the infrastructure facility, quality of the product or the service, price per unit) and that, in particular, the summary should not include "input" elements of the unsolicited proposal (e.g. the design of the facility, technology and equipment to be used). The reason for that limitation was to avoid disclosing to potential competitors proprietary information of the person who had submitted the unsolicited proposal.

134. It was observed that paragraph 125 (b) envisaged a "margin of preference" as a possible incentive to attract unsolicited proposals; it was pointed out that the use of a margin of preference originated in the context of procurement of goods, construction and services and that

such a margin of preference worked well when applied to the price elements of a proposal, but that it was difficult to apply to non-price evaluation criteria. It was therefore suggested that consideration should be given to somewhat rewording the paragraph in order to give more guidance as to the application of the margin of preference in the context of unsolicited proposals.

Review procedures (legislative recommendation 21 and paras. 129-133)

135. It was suggested that the notes, and possibly also the recommendation, should emphasize the usefulness of a workable "pre-contract" recourse system, i.e. procedures for reviewing the contracting authority's acts as early in the selection proceedings as feasible. The benefit of such a system was to increase the possibility of corrective actions being taken by the contracting authority before loss was caused and to reduce cases where monetary compensation was the only option left to redress the consequences of an improper action by the contracting authority.

Record of selection proceedings (legislative recommendation 22 and paras. 134-141)

136. It was suggested that the Commission should consider rewording the title of the recommendation to read "Record of selection and award proceedings". It was suggested that recommendation 21 should be aligned with the notes, in particular to make the recommendation as strong as it was described in the notes.

Chapter IV. The project agreement (A/CN.9/458/Add.5)

General remarks

137. By way of a general comment, it was suggested that the relationship between the draft chapter and other portions of the guide might need to be reviewed. It was pointed out that a number of issues discussed in chapter V, "Infrastructure development and operation" (A/CN.9/458/Add.6), and chapter VI, "End of project term, extension and termination" (A/CN.9/458/Add.7), related to matters that were typically dealt with in project agreements.

138. The structure of the draft chapter, it was suggested, might be improved if subsection B.8, "Duration", and subsection B.5, "Organization of the concessionaire", would, in that order, immediately follow subsection B.1, "Financial arrangements".

139. While no objections were voiced to those proposals, the view was expressed that, in preparing the legislative guide, the Commission had to deal with a variety of issues that received different legislative and contractual treatment in various legal systems. The Commission was urged to adopt a pragmatic approach when considering the overall structure of the guide and to proceed with the review of the substance of the draft chapters before making a final decision on the structure.

140. The suggestion was made that some of the legislative recommendations should expressly recommend the adoption of legislation to achieve the objectives stated in the chapter.

141. The view was expressed that, although the notes appropriately, and in a balanced manner, reflected solutions found in different legal systems, the draft chapter appeared to give more emphasis to the need for attracting financing for privately financed infrastructure projects than to the public service nature of most of those projects.

Conclusion of the project agreement (legislative recommendation 1 and paras. 5-8)

142. The Commission agreed to delete the word "simplify" in legislative recommendation 1 and to replace it by the word "facilitate" or another word with equivalent meaning.

143. With regard to the reference, in legislative recommendation 1, to the need for identifying in advance the offices or agencies competent to approve and sign the project agreement, it was suggested that such identification was an essential element of the institutional framework for the implementation of privately financed infrastructure projects in the host country. The inclusion of such a reference in the draft chapter might create the undesirable impression that the offices or agencies competent to approve and sign the project agreement could be made known only after the conclusion of the procedure to select the concessionaire. It was therefore agreed that the second phrase of legislative recommendation 1 should be moved to an appropriate place in draft chapter I, "General legislative considerations" (A/CN.9/458/Add.1).

144. The view was expressed that the second sentence of paragraph 4 needed to be redrafted so as to make it clear that it referred to general legislation, rather than to specific legislation, which in some countries might need to be adopted in respect of individual projects.

145. It was suggested that the last sentence of paragraph 8 should be revised in order to clarify the manner in which the contracting authority might undertake to compensate the winning bidder in the event that the final approval to the project agreement, where required, was withdrawn.

Financial arrangements (legislative recommendations 2 and 3 and paras. 10-21)

146. It was agreed that legislative recommendation 2 (a) duplicated the essence of legislative recommendation 6 and that the two recommendations should be combined. It was also suggested that legislative recommendations 2 (b) and 2 (c) should be consolidated in one single text.

147. The view was expressed that the last sentence of paragraph 12, which referred to the importance of ensuring that the laws of the host country did not unreasonably restrict the concessionaire's ability to offer adequate security to its lenders, was not entirely consistent with the contents of paragraphs 32 to 40, which referred to possible legal obstacles to the creation of certain types of security and other provisions to safeguard the public interest. It was agreed that the sentence in question should be deleted.

148. It was pointed out that paragraph 13 mentioned the role played by "special-purpose vehicles" in securitization transactions. It was suggested that the draft chapter should also provide a specific legislative recommendation on that matter. In reply to that suggestion, it was observed that the notion of "special-purpose vehicles" was not known in many legal systems, and that the use of special-purpose vehicles in connection with securitization transactions required an appropriate legal framework in other areas of law. Since the draft chapter could not deal exhaustively with the matter, it was proposed that a reference to the usefulness of adopting provisions that facilitated the establishment of special-purpose vehicles should be mentioned in the appropriate part of draft chapter VII, "Governing law" (A/CN.9/458/Add.8), rather than in draft chapter IV. The view was also expressed that the discussion concerning securitization transactions in paragraph 13 was too detailed and might be usefully shortened.

149. It was noted that paragraph 17 described arrangements whereby the contracting authority or other governmental agency made direct payments to the concessionaire as a substitute for, or in addition to, service charges to be paid by the users. It was observed that some of those arrangements might involve a form of subsidy to the project company and, accordingly, might not be consistent with the host country's obligations under international agreements on regional economic integration or trade liberalization.

150. It was suggested that the description of the different modalities of off-take agreements, which was contained in subparagraphs (a) and (b) of paragraph 20, might not be needed in the guide, since the arrangements described therein were essentially of a contractual nature.

151. It was agreed that the third sentence of paragraph 21 was not needed and that it should be deleted.

The project site (legislative recommendation 4 and paras. 22-27)

152. No comments were made on legislative recommendation 4 and paragraphs 22 to 27 of the notes.

Easements (legislative recommendation 5 and paras. 28-31)

153. It was agreed that legislative recommendation 5 should be reformulated so as to provide that the host country might wish to adopt legislative provisions that facilitated the acquisition by the concessionaire of the easements that might be needed for the construction, operation and maintenance of the infrastructure facility.

154. It was observed that the word "easement" had a narrow connotation in some legal systems, and that the statutory authority granted to the concessionaire, for example, to place water pipes or power transmission cables on property owned by third parties might not necessarily be regarded as an easement. It was agreed that that circumstance should be reflected in paragraph 29.

Security interests (legislative recommendation 6 and paras. 32-40)

155. The proposal was made that legislative recommendation 6 should make reference to the establishment of security interests over the shares of the project company, so as to reflect the discussion contained in paragraph 40.

156. The proposal was made that legislative recommendation 6 should be redrafted so as to indicate possible obstacles and limitations to the creation of security interests, according to the legal tradition of the host country, as discussed in paragraphs 32 to 40.

157. It was pointed out that security taken by lenders extending loans to privately financed infrastructure projects played primarily a defensive role, a circumstance that should be emphasized in paragraph 32. It was also

suggested that paragraphs 32 to 40 should include a reference to the fact that the loan agreements often required that the proceeds of infrastructure projects should be deposited in an escrow account managed by a trustee appointed by the lenders.

158. It was observed that, in some legal systems, public service concessions were granted in view of the particular qualifications and reliability of the concessionaire and were not freely transferable. As a result of that general principle, any security given to lenders which made it possible for them to take over the project could only be admitted under exceptional circumstances and under certain specific conditions, namely: that they required the agreement of the contracting authority; that the security should be granted for the specific purpose of facilitating the financing or operation of the project; and that the security interests should not affect the obligations undertaken by the concessionaire. Those conditions, which should be mentioned in paragraphs 32 to 40, derived from general principles of law or from statutory provisions and could not be waived by the contracting authority through contractual arrangements.

159. It was suggested that the last sentence of paragraph 36, which referred to the possibility of dispensing with the requirement of specific acts of approval for each asset in respect of which a security interest was created, was not appropriate in the context of paragraphs 34 to 36 and that it should be deleted.

160. The view was expressed that security in the form of assignment of receivables played a central role in the financial arrangements for infrastructure projects, and that paragraphs 37 to 39 should elaborate further on that issue, as well as on the importance of having in place an appropriate legal framework for the assignment of trade receivables. It was agreed to insert, at an appropriate place, the substance of the discussion contained in paragraph 28 of draft chapter VII, "Governing law" (A/CN.9/458/Add.8).

161. It was agreed to delete the word "unnecessarily" in the third sentence of paragraph 40.

Organization of the concessionaire (legislative recommendations 7 and 8 and paras. 41-51)

162. It was pointed out that, where the law required the concessionaire to be incorporated under the laws of the host country, the contracting authority might lack the power to waive such a requirement without legislative authorization. For purposes of clarity, it was agreed that recommendation 7 should be redrafted so as to clarify that the contracting authority was given an option by the law, but not the power to waive statutory requirements.

163. It was agreed that, for purposes of clarity, the order of the first two sentences of paragraph 46 should be reversed.

164. In connection with paragraph 48, the view was expressed that the requirement of a certain minimum equity investment for companies carrying out infrastructure projects might be inconsistent with the host country's obligations under international agreements on the liberalization of trade in services.

Assignment of the concession (legislative recommendation 9 and paras. 52-55)

165. The view was expressed that the question of subconcessions, which was briefly discussed in paragraph 55, had far-reaching implications in some legal systems, which deserved to be mentioned in the guide. However, that discussion was more closely related to the question of subcontracting and, therefore, it should be moved to an appropriate place in draft chapter V, "Infrastructure development and operation" (A/CN.9/458/Add.6).

Transferability of shares of the project company (legislative recommendation 10 and paras. 56-63)

166. Besides editorial and terminological suggestions, and the reiteration of some of the general remarks that had been made earlier, the legislative recommendations and the accompanying paragraphs of the notes did not elicit comments.

Duration of the project agreement (legislative recommendation 11 and paras. 64-67)

167. In response to a question as to the need for legislative recommendation 11, it was pointed out that past experience with infrastructure concessions had demonstrated the desirability of requiring that such concessions should have a limited duration. However, the maximum duration of concessions did not necessarily need to be provided for in legislation.

168. The view was expressed that the question of the duration of infrastructure concessions raised various issues of policy which should be elaborated upon in the draft chapter. Cross-references should also be added to later

portions of the guide, such as draft chapter VI, "End of project term, extension and termination" (A/CN.9/458/Add.7), which dealt with other matters relevant for that discussion.

Chapter V. Infrastructure development and operation (A/CN.9/458/Add.6)

General remarks

169. As a general comment, it was suggested that sections D to H of the draft chapter should be moved to draft chapter IV, "The project agreement" (A/CN.9/458/Add.6).

Subcontracting (legislative recommendation 1 and paras. 2-4)

170. In connection with recommendation 1 (a), the view was expressed that it was not sufficient to merely advise the contracting authority of the names and qualifications of the subcontractors engaged by the concessionaire. It was suggested that the contracting authority might have a legitimate interest in reviewing all of the major subcontracts negotiated by the concessionaire, and not only contracts entered into by the concessionaire with its own shareholders or affiliated persons. The Commission agreed that legislative recommendation 1 (a) should be deleted and that legislative recommendation 1 (b) should be expanded so as to cover all major contracts entered into by the concessionaire.

171. It was observed that, in some legal systems, government contractors were not free to subcontract their obligations without the prior approval of the contracting authority. Furthermore, in the context of some regional integration agreements, there were rules that prescribed the use of specific procedures for the award of subcontracts by concessionaires of public services. The concern was expressed that recommendation 1 and the accompanying notes appeared to advocate the concessionaire's unrestricted freedom to hire subcontractors. It was suggested that the notes should be revised accordingly. The fourth sentence of paragraph 3, which stated that, for privately financed infrastructure projects, there might no longer be a compelling reason of public interest for prescribing to the concessionaire the procedure to be followed for the award of its contracts, should be deleted.

Construction projects (legislative recommendation 2 and paras. 5-17)

172. As a general comment, it was suggested that legislative recommendation 2 (b) was too detailed and that it might be preferable to simply state instead that the project agreement should provide for the right of the contracting authority to order variations in the construction specifications and set forth the compensation to which the concessionaire should be entitled.

173. It was suggested that the contracting authority's right to order variations, which was mentioned in legislative recommendation 2 (b), was not limited to construction specifications, and should also encompass variations in respect of the conditions of service.

174. It was agreed that the wording of legislative recommendation 2 (c) should be brought in line with legislative recommendation 2 (b).

175. The need for limiting any suspension of the project to the time strictly necessary, it was observed, did not arise only in connection with the exercise by the contracting authority of its monitoring rights. Therefore, it was suggested that the second sentence of legislative recommendation 2 (c) should become a separate recommendation.

176. It was suggested that the contracting authority's potential liability for defects arising from the inadequacy of the approved design or specifications might extend beyond the situations referred to in the second sentence of paragraph 9, which should be expanded accordingly.

177. The second sentence of paragraph 12, it was suggested, should also refer to the time-frame within which the concessionaire had to implement variations ordered by the contracting authority. However, one view expressed was that it was not advisable to establish a set maximum limit for the variations ordered by the contracting authority and that, therefore, the last sentence of paragraph 12, as well as the last phrase of legislative recommendation 2 (b), should be deleted.

178. The view was expressed that the last two sentences of paragraph 13 were unclear and needed to be redrafted.

179. It was suggested that the words "in excess of the agreed maximum period" in the third sentence of paragraph 14 should be deleted.

180. It was suggested that legislative recommendation 2 (d) should express the idea that acceptance of the infrastructure facility should not be denied unless the works were found to be materially incomplete or defective.

181. It was agreed that the last sentence of paragraph 16, which might imply a confusion between regulatory powers and the role of the contracting authority, should be deleted.

182. The view was expressed that the meaning of the words "final approval" and "final authorization" in respect of construction works was unclear, and that paragraphs 5 to 17 should clarify who was responsible for accepting the works carried out by the concessionaire.

Infrastructure operation (legislative recommendations 3-6 and paras. 18-46)

183. As a general comment, it was pointed out that legislative recommendations 3 to 6 were concerned with regulatory matters that would not ordinarily be dealt with in the project agreement. In response, it was noted that the type of instruments used to deal with the matters discussed in paragraphs 18 to 46 varied according to the legislative practice and administrative tradition of the country concerned. The guide should therefore reflect the fact that, for those legal systems which did not provide for regulation of the operation by legislative means, the issues contemplated in legislative recommendations 3 to 6 would need to be addressed in the project agreement. Furthermore, project agreements often supplemented regulatory provisions so that, in practice, there existed a certain degree of duplication that the guide should take into account.

184. It was suggested that the beginning of the third sentence in paragraph 18 should be rephrased to refer not only to countries that had general legislation on concessions, but also to those that planned to have such legislation.

185. It was suggested that the last sentence in paragraph 22 should be rephrased to indicate that it would not merely be advisable, but essential, to require that the project agreement set forth the circumstances under which the concessionaire might be required to carry out extensions in its service facilities and the appropriate methods for financing the cost of any such extension. It was also suggested that the paragraph should begin with the phrase "in some legal systems".

186. It was pointed out that, in some legal systems, the concessionaire's obligations to ensure the continuous provision of the public service derived from general principles of law or from statutory provisions, and that it would not be possible to provide in the project agreement for the extraordinary circumstances that would justify suspending the service or even releasing the concessionaire from its obligations. It was suggested that the sentence which stated that termination typically required the consent of the contracting authority or a judicial decision could be misinterpreted as expressing advice and should either be deleted or rephrased. Alternatively, the words "in legal systems which admit such a solution" should be added to the last sentence of paragraph 24.

187. Concern was expressed that the notes did not adequately reflect the principles of equality and universality of service. One view was that equality of treatment was similar to the principle of access to public services. Another view was that those principles were distinguishable. By way of illustration, it was pointed out that a public works operator might have to ensure coverage in regions of the country where such operations might not be profitable. In such instances, it was felt that the concessionaire should have a direct right to compensation or the right to end the project. After it had been pointed out that paragraph 37 of draft chapter II, "Project risks and government support" (A/CN.9/458/Add.3), addressed that situation, it was decided to include an appropriate cross-reference. It was also pointed out that, in some systems, those principles extended to adaptability, requiring the operator to integrate technological transformations during the operation of the concession.

188. In connection with legislative recommendation 4, it was pointed out that it would not always be the project agreement that would set forth the mechanisms for periodic or extraordinary revisions of the price adjustment formula. In countries where this would be set out in legislation, it might not be possible to establish price control mechanisms by agreement. In response, it was explained that the provisions should be kept flexible because of differences in the regulatory mechanisms of countries, but it was agreed that the recommendation should be revised to take into account the concerns that had been expressed.

189. It was pointed out that the first sentence of paragraph 31 was circular and should be redrafted. It was suggested that in paragraph 33 the reference to the reviews of tariffs needed further explanation. It was pointed out that the rate-of-return method was primarily used in sectors involving an element of monopoly, such as telecommunications, power, gas and water distribution projects. For

sectors with greater elasticity of demand, such as road transportation, it might not always be possible to keep the concessionaire's rate of return constant by regular price adjustment. Thus, paragraph 34 needed to be revised. In response to those concerns, it was noted that the question of tariff regulation was one of great complexity and that the discussion in the draft chapter was only illustrative of the main methods of calculating the rate of return, depending on the type of infrastructure. It was acknowledged, however, that the notes were compressed and might require some elaboration. It was suggested that the revisions should point out the complexity of the matter and the importance of continuing demand to ensure that the operation of the facility would be able to continue.

190. It was suggested that paragraph 38 should mention the possible impact of the various policy options referred to therein on private sector investment decisions.

191. It was pointed out that the monitoring of the concessionaire's performance might be carried out by the regulatory body, rather than the contracting authority, and that recommendation 5 (b) should be revised accordingly.

192. It was suggested that, because in some legal systems rules might only be issued by a legislative body, the sentence in paragraph 45 which stated that the concessionaire might be authorized to issue rules governing the use of the facility by the public should be revised accordingly. It was pointed out that the approval of operating rules proposed by the concessionaire was often a matter of regulation that would fall within the duties of the State. It was felt that there would be certain principles from which the concessionaire should not be able to deviate. Moreover, paragraphs 42 to 46 raised concerns related to the protection of users and consumers, since the concessionaire should not have the power to limit unilaterally its liability or the scope of its general duties in respect of the public service.

193. Another view was that, where the facility had been privately owned and developed, the owner or operator should have the right to establish the terms of use by others, most appropriately by way of contract. Caution was advised in suggesting that the right of approval in such circumstances belonged solely to the regulatory body. It was also suggested that the right of approval referred to in legislative recommendation 6 should be based on objective conditions.

194. There was general agreement that the reference to the concessionaire's authority to issue rules governing the use of the facility by the public was not intended to imply a transfer to the concessionaire of statutory powers or of inherently governmental functions, although it was acknowledged that the latter notion evolved constantly.

195. It was agreed that the word "discretionary" in paragraph 45 should be replaced by the word "arbitrary".

Guarantees of performance and insurance (legislative recommendation 7 and paras. 47-58)

196. In response to a suggestion, it was agreed that paragraph 49 would be revised to refer to dispute settlement in general, rather than specifically to arbitral proceedings.

197. It was suggested that, if the concessionaire was allowed to fix the sum payable under the guarantee or stand-by letter of credit as a small percentage of the project cost, as suggested at the end of paragraph 52, a statement to that effect would need to be included in the request for proposals.

Changes in conditions (legislative recommendation 8 and paras. 59-68)

198. It was suggested that paragraph 65 should provide that the bidder would usually strive to include into its bid documents such mechanisms as protection against the adverse financial and economic impact of extraordinary and unforeseen events that could not have been taken into account when the project agreement was negotiated.

199. It was suggested that the last line of paragraph 68 should be redrafted to reflect the two different points more clearly. It would be desirable both to introduce a ceiling for the cumulative amount of periodic revisions of the project agreement and to establish the amount of the ceiling.

Exemption provisions (legislative recommendation 9 and paras. 69-79)

200. It was suggested that, in the third sentence of paragraph 72, the words "the concessionaire" should be added to the beginning of the final phrase.

201. The view was expressed that the meaning of paragraph 73 was not entirely clear, and that a distinction should be made between exemption of liability and excuse of performance. In reply, it was pointed out that paragraph 73 had been drafted in rather general terms because some legal systems had limits on the rights of the parties to

provide for exempting circumstances. In such systems, an exempting circumstance produced legal effects as soon as it occurred, whereas in other legal systems a prior finding, for instance, by a dispute settlement body, was required. It was agreed that paragraph 73 required further clarification.

Events of default and remedies (legislative recommendations 10 and 11 and paras. 80-91)

202. It was suggested that the term "serious failure" in recommendation 11 (a) might need further explanation. In response, it was pointed out that the term was used to cover different terms of art used in national laws and that it had been used in other texts produced by the Commission.

203. It was suggested that the last line of paragraph 84 should be revised to read that "it is important to limit the contracting authority's right to intervene". It was also noted that the previous sentence interrupted the pattern of thought expressed in the paragraph and should be relocated.

204. Clarification was sought as to the meaning of the term "apparently irremediable" in paragraph 88. It was explained that a situation might arise whereby the concessionaire had become completely unable to provide the services; such a situation would be apparently irremediable and would entitle the exercise of step-in rights on the part of the contracting authority or the lenders. It was noted that step-in rights should only be exercised in an extreme case.

205. Clarification was sought as to the intention of the first sentence in paragraph 90. It was explained that, in several countries, it had been necessary to introduce legislative provisions authorizing the transfer of the concession to an entity appointed by the lenders. However, nothing in paragraphs 87 to 91 was intended to affect the general prohibition against the transfer of public services concessions, which existed in some legal systems. The transfer of the concession to a new concessionaire pursuant to the exercise by the lenders of their step-in rights always required the approval of the contracting authority, a circumstance which could be emphasized in paragraph 91.

Chapter VI. End of project term, extension and termination (A/CN.9/458/Add.7)

General remarks

206. As a general comment, it was said that some of the discussion contained in the notes to the legislative recommendations needed to focus more clearly on issues particular to privately financed infrastructure projects. Furthermore, the legal consequences of the expiry of the concession period, and of early termination, might differ in respect of issues such as payments concerning assets transferred to the contracting authority, a circumstance that should be reflected in the notes. The proposal was made that the draft chapter should make a distinction between the following situations:

(a) Termination following impeding events, to the extent that the concessionaire did not agree to assume the risk relating to the event. In such a case, the compensation due to the concessionaire should include repayment of the investment made, unless already recovered by project revenues (including any subsidy or other aid received from the contracting authority or the Government), and costs entailed by termination. Such compensation would normally correspond to the combined amount of equity investment and the debt then outstanding, but would not include lost profits;

(b) Termination due to acts of the contracting authority or of the Government. The compensation payable in such a case would be similar to the previous case, but might include some compensation for lost profits;

(c) Termination for convenience by the contracting authority. The compensation payable in such a case would be similar to (a) above, but would normally include compensation for lost profits;

(d) Termination due to breach by the contracting authority. The compensation due to the concessionaire would be the same as in (c) above;

(e) Termination due to breach by the concessionaire. In such a case, the lenders would normally have to accept to share some of the risk, and the compensation payable to the concessionaire would include payment of the residual value of the assets, taking into account the amount of unrecovered investment made by the concessionaire, unless the contracting authority was able to demonstrate that the assets had a lesser market value. There might also be claims for damages by the contracting authority against the concessionaire, even though it might not be realistically expected that a project company especially established to carry out the project would have the means to honour such claims;

(f) Normal expiry of the project agreement. In such a case, all assets needed to be returned to the contracting authority free of charge, except for assets that were not originally foreseen in the concessionaire's initial investment estimates, but which the concessionaire had been required to build or acquire pursuant to subsequent requests by the contracting authority.

207. The Commission considered that the proposed analysis, which drew upon elements already contained in the draft chapter, provided a useful basis for its deliberations on the matter. However, several questions were raised concerning the rationale for the distinctions made between the various categories of termination and the standards of compensation proposed for each category.

208. As regards the wording of the legislative recommendations, the Commission agreed that their meaning could be made clearer by drafting them in a manner that stated the general principle expressed in each legislative recommendation, which should be followed, as appropriate, by the exceptions to the general principle.

209. The suggestion was made that subsection B.8 of draft chapter IV, "The project agreement" (A/CN.9/458/Add.5), which dealt with the duration of the concession period, should be moved to the draft chapter under discussion.

210. The view was expressed that the word "amortization", which was used sometimes in the draft chapter, had a technical meaning in accounting practice and that, where appropriate, it would be preferable to refer instead to recovery of investment (see also below, para. 246).

Extension of the project agreement (legislative recommendation 1 and paras. 2-4)

211. It was agreed that the language in legislative recommendation 1 and the accompanying notes, in particular the references to exempting circumstances, should be brought into line with terminology used in earlier chapters of the guide.

212. The view was expressed that legislative recommendation 1 appeared to be excessively restrictive, since it implied that concessions could only be granted for a set period of time. In response, it was observed that infrastructure concessions often involved an element of monopoly and that an excessively generous regime for extending them might not be consistent with the competition laws and policies of a number of countries. Clear rules on the matter were also needed in order to ensure transparency and protect the public interest. Thus, it was appropriate to regard the possibility of extending the concession period as a measure to be used only under circumstances clearly defined in law. The words "exceptional circumstances", in that connection, were considered to be vague and subject to different interpretation in various legal systems and should, therefore, be avoided.

213. The possibility of extending the term of the concession, it was observed, served a useful purpose as a mechanism for affording the concessionaire additional time to recover its investment, where the concessionaire had incurred a loss due to circumstances outside its control. However, it might be misleading to link such a possibility only to situations where the concessionaire was entitled to compensation from the contracting authority. In practice, situations might exist where, even without such a legal entitlement, it might be in the public interest to extend the concession period, for example, in order to allow the project to be completed. Furthermore, the current formulation of legislative recommendations 1 (a) and 1 (b) appeared to imply that there should be different standards of compensation for the two situations contemplated therein, which was not found to be entirely consistent with the text in the accompanying notes. It was generally felt that legislative recommendations 1 (a) and 1 (b) should be redrafted so as to refer to the circumstances under which an extension was justifiable, without mentioning the notion of compensation.

214. In response to a suggestion that legislative recommendations 1 (a) and 1 (b) should be combined, the view was expressed that, in the revision of the legislative recommendations, it was advisable to avoid confusion as to the different situations that might give rise to interruptions in the execution of the project. They included acts of the parties to the project agreement, acts of third parties (such as governmental agencies of the host country other than the contracting authority) and events outside the control of either party. Care should be taken to avoid any impression that an extension of the concession period might be possible even where it was a result of situations attributable to the concessionaire.

215. It was suggested that the reference to project suspension appeared to imply that an extension of the concession period would only be possible where a decision to suspend the project had been made. The legislative recommendation should, therefore, also mention delays in completion.

Termination by the contracting authority (legislative recommendations 2 and 3 and paras. 5-23)

216. By way of a general comment, the Commission was urged to approach with caution the issue of compensation for termination by the contracting authority, since that was a controversial area in many countries. While the draft chapter could provide an indication as to standards of compensation that had been used in practice, it might not be advisable to attempt to formulate precise recommendations as to what those standards should be in the various situations discussed in the draft chapter.

217. The view was expressed that the Commission should carefully consider the desirability of referring to termination for convenience by the contracting authority, which was contemplated in legislative recommendation 2 (c) and in paragraphs 22 to 23 of the accompanying notes. Termination for convenience increased the risk to which potential investors were exposed, which might add to the cost of financing the project. In reply, it was observed that, in some legal systems, the possibility of unilateral termination of the concession by the contracting authority was a fundamental principle of the law governing public contracts. Although the project agreement could be terminated by the contracting authority even without prior final decision by the dispute settlement body (contrary to what was suggested in paragraph 9 of the notes), that did not mean that the concessionaire was exposed to arbitrary acts of the contracting authority, since the contracting authority's acts were generally subject to judicial control and unilateral termination required payment of full compensation to the concessionaire. The Commission agreed, however, that the third sentence of paragraph 7 might be perceived as encouraging the use of unilateral termination rights by the contracting authority and that that sentence should be deleted.

218. The Commission took note of the various views that were expressed concerning the use of the words "fair compensation" in legislative recommendation 2 (c) and a possible alternative wording for that provision. According to one view, the expression "fair compensation" was ambiguous, since the various parties involved might interpret it differently, and it might be preferable to refer simply to "compensation". Another view was that, despite its apparent ambiguity, the expression "fair compensation" was useful, since it indicated that the compensation due to the concessionaire needed to be equitable and could not be unilaterally and arbitrarily set by the contracting authority. According to yet another view, a reference to "full compensation" would more appropriately reflect the practice in some legal systems. However, that view was objected to on the ground that the expression "full compensation", which implied compensation of the full market value of the undertaking, did not afford the degree of flexibility needed in connection with the issue under consideration.

219. The Commission was reminded that the standard of compensation in the event of termination for convenience by the contracting authority was a sensitive issue in a number of countries since it raised considerations similar to those that applied in connection with the standard of compensation due in the event of expropriation or nationalization. The language used in the guide should take into account various general guiding principles that had been formulated on the matter, including principles contained in resolutions adopted by the General Assembly of the United Nations.

220. In connection with paragraph 13 of the notes, it was suggested that the text should refer to the need for the contracting authority to give notice to the concessionaire when the latter was found to be in serious default on its obligations. It was also suggested that the reference to the lenders' right of substitution should be qualified by a phrase such as "where its exists".

221. It was agreed that the draft chapter should distinguish more clearly the replacement of the concessionaire by a new entity appointed by the lenders from the possibility given to the lenders to temporarily engage a third party to cure the consequences of default by the concessionaire, which was mentioned in legislative recommendation 3 (b). Furthermore, both the legislative recommendations and the notes thereto should mention, as appropriate, that any such substitution or temporary engagement of a third party usually required the consent of the contracting authority.

222. It was suggested that paragraph 14 should be revised, since not all of the situations referred to in subparagraphs (a) to (c) constituted conditions precedent to the entry into force of the project agreement.

223. It was suggested that the words "as provided in the project agreement" in paragraph 16 (c) were inconsistent with the reference, in the same sentence, to statutory obligations, and that those words should therefore be deleted.

224. The grounds for termination mentioned in paragraph 18 (d) of the notes, it was suggested, appeared to

duplicate the provisions of paragraph 18 (a). Thus, the two subparagraphs should be combined.

225. For purposes of clarity, it was suggested that the second sentence in paragraph 19 should be redrafted along the following lines: "In such cases it may be advisable to design effective mechanisms to combat corruption and bribery and to afford the concessionaire the opportunity to file complaints against demands for illegal payments or unlawful threats by officials of the host country."

226. It was agreed that the wording of legislative recommendation 2 (c) should be brought into line with legislative recommendation 2 (b).

227. The view was expressed that the words "exceptional situations" in the fifth sentence of paragraph 23 did not provide sufficient guidance to the readers of the legislative guide. It was therefore proposed to delete those words and to insert the words "in cases where" before the words "a compelling reason of public interest", which should be followed by the words "which should be restrictively interpreted".

Termination by the concessionaire (legislative recommendation 4 and paras. 24-29)

228. It was pointed out that the concept of unilateral termination on the part of the concessionaire was unknown in some legal systems. In those countries, the concessionaire would only be able to request a third party, such as the competent court, to declare the termination of the project agreement under exceptional circumstances. In response, it was observed that such limitations on the concessionaire's ability to terminate the project agreement were not universally recognized and that, in practice, potential investors might be reluctant to invest in infrastructure projects in jurisdictions that limited their ability to terminate the project agreement in situations such as those mentioned in legislative recommendation 4. It was pointed out that, in the circumstances described in paragraphs 4 (a) and 4 (b), the concessionaire or the project investors would want the right to buy out the party in breach. It was suggested that, since the availability of such an option would be attractive to foreign investors, a reference to it should be included in the notes accompanying legislative recommendation 4. In any event, it was said that it would not be advisable to include in recommendation 4 any reference to a requirement for a judicial decision, because in many legal systems that would not be required.

229. Having considered the various views expressed, the Commission agreed that the substance of legislative recommendation 4 should be retained, but that the chapeau of that recommendation, however, should be reworded to clarify that termination by the concessionaire may be carried out only under exceptional circumstances. Furthermore, it was agreed that paragraph 24 of the notes accompanying legislative recommendation 4 should indicate that in some legal systems the concessionaire did not have the right to terminate the project agreement unilaterally, but only the right to request a third party, such as the competent court, to declare the termination of the project agreement.

230. It was pointed out that subparagraph (a) of recommendation 4, which referred to serious breach by the contracting authority or other governmental agency, did not provide examples of such a breach, as had been given in recommendation 3 in the case of breach by the concessionaire. It was suggested that appropriate examples should be included in the notes accompanying legislative recommendation 4.

231. In response to a question concerning the reference to serious breach by governmental agencies other than the contracting authority, it was explained that the type of breach contemplated in legislative recommendation 4 (a) was not only failure by the contracting authority to meet its payment or other obligations under the project agreement, but would also include the breach by other governmental agencies of their obligations vis-à-vis the concessionaire, such as undertakings to provide specific forms of support to the concessionaire.

232. It was suggested that the adjective "material" or "substantial" should be added to the first sentence of paragraph 25, in order to clarify that a party might withhold performance of its obligations only in the event of a material or substantial breach by the other party. Another suggestion was that, given that not every breach would result in the right to withhold performance, it would be more appropriate for the sentence to refer to "certain types of" breach.

233. One suggestion was that it was necessary to elaborate paragraph 25 in order to specify the legal procedures that would govern the termination of the contracts referred to therein, such as the requirement in some countries for judicial decisions to justify termination by the concessionaire. Under such systems, the concessionaire would not be able to invoke a breach on the part of the contracting

authority as an excuse for non-performance as stated in the notes. The prevailing view, however, was that the notes already took into account, in a well-balanced manner, the relevant rules of various legal systems in that respect, and that paragraph 25 could be maintained without change.

Termination by either party (legislative recommendation 5 and paras. 30 and 31)

234. The view was expressed that legislative recommendation 5 (a) was redundant and that it should be subsumed into legislative recommendation 4 (b). In response, it was explained that legislative recommendation 5 (a) referred to the occurrence of exempting impediments that could operate to the benefit of either party, whereas legislative recommendation 4 (b) covered unforeseen changes in conditions that would give only the concessionaire the right of termination.

235. The question was asked whether it was necessary to include a legislative recommendation on the ability of the parties to terminate the project agreement by mutual consent, as provided in paragraph 31. In response, it was noted that, in some legal systems, the contracting authority might lack authority to do what might amount to a discontinuation of services, in the absence of approval by a specified authority of the Government.

Transfer of assets to the contracting authority (legislative recommendation 6 and paras. 33-35)

236. It was suggested that paragraph 33 should be redrafted and that the discussion on the transfer of project-related assets also should include a reference to assets that had been built by the concessionaire. It was noted that intangible assets did not appear to have been included in that discussion.

237. It was observed that recommendations 6 and 7 did not differentiate between normal termination of the project agreement at the end of its term, and early termination. One view was that such differentiation was necessary, because the concessionaire's right to compensation would not arise in both cases, contrary to the implication to that effect that was underlying recommendations 6 and 7. Another view was that the recommendations were sufficiently clear in addressing how to deal with project assets upon termination, regardless of the manner by which termination had occurred.

238. It was observed that recommendation 6 referred to a purchase against payment of fair market value, whereas recommendation 7 referred to a transfer against adequate compensation. It was suggested that consistent terms should be used.

239. It was pointed out that, even in cases where the concessionaire would be expected to continue to operate the facilities, the contracting authority might wish to have ownership of the project assets. Therefore, it was suggested that paragraph 35 (a) should be revised accordingly. It was suggested that, in the penultimate sentence of paragraph 35 (b), the phrase "expected to be" should be deleted. The view was also expressed that the reference to assets expected to be fully amortized, and in respect of which only a nominal price might be paid, was unclear and needed to be clarified.

240. The suggestion was made that, in the last sentence of paragraph 35 (b), the term "retention" was too narrow, since the Government might be interested in acquiring a security interest without retaining the asset. It was also pointed out that in paragraph 35 (c) it was necessary to refer to both subparagraphs (a) and (b) of paragraph 35; assets that would remain the private property of the concessionaire would be those that neither would have to be transferred to the contracting authority, under paragraph 35 (a), nor might be purchased by the contracting authority at its option, under paragraph 35 (b).

Transfer of assets to a new concessionaire (legislative recommendation 7 and para. 36)

241. It was suggested that the words "during the life of the project" in the last sentence in paragraph 36 should be deleted. It was pointed out that the first sentence in subparagraph (b) was unclear and that the relationship between residual value and the concessionaire's financing arrangements should be explained.

242. It was suggested that the meaning of the penultimate sentence of paragraph 37 could be clarified by stating that the assets should be returned to the contracting authority in such condition as would be necessary to allow for normal functioning of the infrastructure facility, taking into account the needs of the service.

Financial arrangements upon termination (legislative recommendation 8 and paras. 39-45)

243. It was observed that in legislative recommendation 8 lost profits were included in the determination of compensation due to the concessionaire under legislative recommendation 8 (b), but were not included under

legislative recommendation 8 (c). It was suggested that a consistent approach was required, both in those two recommendations and in the accompanying notes. It was pointed out that a recommendation to include lost profits in the determination of compensation payable would be viewed favourably by investors.

244. It was pointed out that paragraphs 37 and 38 also did not differentiate between expiry of the project agreement and early termination, as had been mentioned previously. For example, the contracting authority's right to receive the assets in operating condition, mentioned in paragraph 37, might not necessarily be applicable in the case of early termination.

245. The view was expressed that, in the last sentence of paragraph 39, the term "negotiating" did not accurately capture the actual process in concluding compensation arrangements. Where the contracting authority used structured competitive procedures to select the concessionaire, the standards of compensation might often be set forth in advance in the draft project agreement circulated with the request for proposals. It was also pointed out that paragraph 39 (b) did not mention that the concept of replacement cost could be used for the purpose of establishing the value of unfinished works.

246. It was pointed out that the use of the term "amortization" in paragraph 39 caused some difficulty. One interpretation that was offered was that, as used in the guide, the term referred only to recovery of investment; as privately financed infrastructure investment was typically a combination of equity and debt, amortization of interest on debt was already included under this interpretation. The view was expressed that the definition of the term "amortization", which was provided in the last sentence of paragraph 39, appeared too late in the draft chapter, and it was suggested that the definition should be moved to an earlier place, where the term "amortization" was first used.

247. It was pointed out that, in paragraph 41 (b), the parting concessionaire could be the one submitting a bid for the project assets mentioned therein. It was also pointed out that the term "offered" might be interpreted to mean that the project assets would be given away without charge. The view was expressed that a provision for the contracting authority to take over the assets, even if not provided for in the project agreement, could lead to an abuse of power and that therefore the reference to this idea should be deleted.

248. The comment was made that the manner of calculation of compensation as described in paragraph 42 was inaccurate; it would not be appropriate to refer only to the concessionaire's revenue during previous financial years in such a calculation because, particularly in the case of early termination, there might not yet have been any history of profitability. This comment was also made in respect of the second sentence in paragraph 45 (b).

249. It was noted that the last sentence of paragraph 45 (a) mentioned that, in the contract practice of some countries, government agencies did not assume any obligation to compensate for lost profits when a large construction contract was terminated for convenience. The view was expressed, however, that such contract practice was not a commendable one, and that the last sentence of paragraph 45 (a) should be deleted.

Wind-up and transitional measures (legislative recommendation 9 and paras. 46-58)

250. As a general comment, it was suggested that paragraphs 46 to 58 should more clearly reflect the fact that the wind-up and transitional measures referred to therein might take place many years after the completion of the construction works, as opposed to similar measures taken in connection with contracts for the construction of industrial works. It was also suggested that the subject matter dealt with in those paragraphs, which involved a variety of contractual considerations, was relevant not only upon transfer of the facility to the contracting authority and should, therefore, be incorporated into chapter IV, "The project agreement" (A/CN.9/458/Add.5).

251. It was observed that the wind-up and transitional measures referred to in paragraphs 46 to 58 would typically be relevant in the context of the ordinary expiry of the concession term. In practice, there might be difficulties in implementing contractual provisions on those matters if the project agreement had been terminated by the contracting authority against the will of the concessionaire.

252. In connection with paragraphs 47 to 51, the view was expressed that obligations concerning the transfer of technology could not be unilaterally imposed on the concessionaire and that, in practice, those matters were the subject of extensive negotiations between the parties concerned. While the host country had a legitimate interest in gaining access to the technology needed to operate the facility, due account should be taken of the commercial interests and business strategies of the private investors.

253. It was pointed out that the concessionaire might not be in a position to undertake some of the transitional

measures referred to in paragraphs 46 to 58, since in most cases the concessionaire would have been established for the sole purpose of carrying out the project and would need to procure the relevant technology or spare parts from third parties.

Chapter VII. Governing law (A/CN.9/458/Add. 8)

General remarks

254. The Commission noted that sections A and B of the draft chapter were new, whereas the substance of sections C and D had been previously contained in an earlier version of draft chapter I, "General legislative considerations" (A/CN.9/444/Add.2). The Commission was informed that, after extensive discussions held at its thirty-first session,[15] the sections dealing with the possible impact of other areas of law on the successful implementation of privately financed infrastructure projects had been considerably expanded.

255. The concern was expressed that the draft chapter was overly ambitious. While acknowledging that the development and implementation of privately financed infrastructure projects would indeed be affected by various other areas of law, it was felt that the discussion in sections C and D was to some extent peripheral to the central issues discussed in the legislative guide. It was pointed out that, within the scope of the draft chapter, it would be difficult to mention all of the relevant areas of law or to adequately address any of them in a manner that was both accurate and concise. It was therefore suggested that the provisions of draft chapter VII should be summarized and re-incorporated into draft chapter I.

256. Another view was that the draft chapter was among the most important parts of the legislative guide because it outlined fundamental issues in the domestic legal regime that would have a direct impact on the likelihood of investment for the development of privately financed infrastructure projects. It was pointed out that the discussion in sections C and D was essential in order to inform Governments of the need for legislative reform and the complexities involved in such projects. Concern was expressed that, if the content of the draft chapter was to be merged with another part of the draft legislative guide, its importance would be lost. It was therefore agreed to retain draft chapter VII, and the discussion turned to the selection of an appropriate title.

257. One view was that the title "Governing law" was misleading since the entire legislative guide was concerned with the law governing the project. A contrary view was that the title was an appropriate expression of the draft chapter's contents, namely, the laws that would govern privately financed infrastructure projects. Yet another view was that the title suggested a discussion limited to choice of law or private international law. Possible alternative titles proposed for consideration by the Commission included "Law governing the risks of the project" and "Legal certainty required by private investment in infrastructure".

The law governing the project agreement (legislative recommendation 1 and paras. 4 and 5)

258. Doubts were expressed concerning the purpose of, and the need for, legislative recommendation 1. It was noted that, in all probability, no Government had enacted, or would be able to enact, provisions that would indicate all applicable statutory provisions. Moreover, it was pointed out that, in so far as the legal regime of the host country would govern the project agreement, it would not be necessary to stipulate which of the laws would apply. Furthermore, it was pointed out that, prior to entering into a project agreement, the concessionaire and its lenders would obtain legal opinions that would outline the applicable legislative provisions.

259. In response to those comments, it was pointed out that it was not the purpose of the legislative recommendation to suggest that the host country should list all laws that directly or remotely affected privately financed infrastructure projects. A country wishing to adopt legislation on privately financed infrastructure projects might wish to address the issues dealt with in the preceding draft chapters of the legislative guide in more than one statutory instrument. Another possibility might be for a host country to introduce legislation dealing only with certain issues that were not already addressed in a satisfactory manner in existing laws and regulations. For instance, general legislation on privately financed infrastructure projects might not provide all the details of the procedures to select the concessionaire, but rather refer, as appropriate, to existing legislation on the award of government contracts. By the same token, when adopting legislation on privately financed infrastructure projects, host countries might need to repeal the application of certain laws and regulations which, in the view of the legislature, posed obstacles to their implementation. For purposes of clarity, legislative recommendation 1 invited the host country to state, as appropriate, the main statutory

or regulatory texts that governed the project agreement and those whose application was excluded.

260. After consideration of the various views expressed, it was generally felt that, although the explanations of the purpose of the legislative recommendation might be usefully reflected in the accompanying notes, the legislative recommendation itself should be substantially redrafted. It was proposed that recommendation 1 should be replaced by a provision such as the following: "The host country may wish to stipulate that, unless otherwise provided, the project agreement is governed by the law of the host country".

261. The concern was voiced, however, that the proposed formulation might lead to different interpretations. Under one possible interpretation, recommendation 1 might be read as implying a legislative authorization for the contracting authority to agree to the choice of a law other than that of the host country to govern the project agreement. Another possible interpretation might be that, although recognizing generally that the laws of the host country applied to the project agreement, legislative recommendation 1 in the proposed new formulation suggested that the contracting authority should have the power to exclude the application of certain areas of law or specific laws. Lastly, the proposed formulation might imply that the governing law would be that of the host country unless the applicable rules of private international law mandated the application of the law of another jurisdiction. Those interpretations might give rise to numerous concerns, in particular in legal systems that did not recognize the ability of governmental agencies to agree to the application of foreign law to their contracts or whose rules of private international law mandated the application of domestic law to government contracts.

262. The Commission took note of those concerns. However, it was generally felt that the proposed new formulation of legislative recommendation 1 (see above, para. 260) more clearly reflected the purpose of the draft chapter than the current text. While it was acknowledged that the primary purpose of draft chapter VII was not to address choice-of-law issues or private international law, the view was expressed that the legislative recommendation should be worded in a manner that upheld the principle of freedom of contract. Under certain circumstances, it was said, Governments should be able to and might choose as the governing law that of another State. Possible legal obstacles to the implementation of that principle under some legal systems should be highlighted in the notes.

263. It was suggested that a cautionary note should be added to paragraph 5 explaining that, if the host country decided to indicate in its law those statutory and regulatory texts of direct application to privately financed infrastructure projects, it should be made clear that such a list would not be an exhaustive one. It was suggested that such a list might best be provided in a non-legislative document, such as a promotional brochure, rather than in legislative provisions.

The law governing contracts entered into by the concessionaire (legislative recommendation 2 and paras. 6-8)

264. The question was asked whether recommendation 2 (concerning the freedom to choose the applicable law) and accompanying paragraphs 6 to 8 covered also, for example, guarantees and assurances by the Government, power purchase or fuel supply commitments by a governmental agency and contracts between the concessionaire and local lenders. In response, it was observed that the freedom to choose the applicable law for contracts and other legal relationships, including those mentioned in the question, was subject to conditions and restrictions pursuant to private international law rules or certain public law rules of the host country. While rules of private international law often allowed considerable freedom to choose the law governing commercial contracts, that freedom was in some countries restricted for contracts and legal relationships that were not qualified as commercial (e.g. certain contracts entered into by governmental agencies or contracts with consumers).

265. The suggestion was made that the second sentence of paragraph 7 should be redrafted. It was noted, in that connection, that States parties to some agreements for regional economic integration were committed to enacting harmonized private international law provisions dealing with contracts between the concessionaire and its contractors.

Other relevant areas of legislation (recommendation 3 and para. 9)

266. Views were expressed that recommendation 3 provided little substantive guidance to States, in particular because it attempted to cover an overly broad area and because the advice was given by way of example rather

than in a complete manner. It was recognized, however, that the topics dealt with in sections C and D of the draft chapter did not lend themselves to the formulation of principles that were suitable for being incorporated into legislation. Nevertheless, legislative recommendation 3 was a useful reminder for domestic legislators that successful privately financed infrastructure projects required appropriate legislation in a number of areas of law.

Promotion and protection of investment (paras. 10-11)

267. It was suggested that it should be stated expressly that the concessionaire was covered by the provisions protecting against nationalization or dispossession. The Commission discussed the way in which that protection was to be described, and it was agreed that the best available formulation was the one used in draft chapter IV, "The project agreement" (A/CN.9/458/Add.5), paragraph 25.

268. With respect to bilateral investment agreements referred to in paragraph 11, it was said that in a number of countries rules aimed at facilitating and protecting the flow of investment (which included also areas such as immigration legislation, import control and foreign exchange rules) were based on legislation that might be, but was not necessarily, based on a bilateral treaty, and that that circumstance should be reflected in the paragraph. It was added that multilateral treaties were also a source of investment protection provisions.

Property law (paras. 12-14)

269. No specific substantive comments were made on paragraphs 12 to 14.

Rules and procedures on expropriation (paras. 15-16)

270. It was observed that land or access to land, as described in paragraphs 15 and 16, might be obtained by a judicial or administrative process of expropriation or by an ad hoc legislative act. It was agreed that the paragraphs should be reviewed so as to emphasize that the need for expeditious and efficient expropriation proceedings should be balanced against the need to respect the rights of the owners concerned. As to the use of the term "expropriation", which in some languages had a negative connotation (since it might suggest confiscation without adequate compensation), it was agreed that, on balance, it should be retained since other possible expressions had a technical meaning proper only to certain legal systems and were difficult to translate or to be understood by the broad readership to whom the guide was addressed.

Intellectual property law (paras. 17-21)

271. It was proposed that the discussion of intellectual property law should include a reference to the advisability for the host country of enacting criminal law provisions designed to combat infringements of intellectual property rights.

272. It was also proposed that the fact that some States had legislation aimed at protecting intellectual property rights in computer software and computer hardware design should be mentioned, and that, in the context of the discussion of paragraph 18, mention should be made of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) concluded under the auspices of the World Trade Organization.

Security interests (paras. 22-30)

273. By way of a general observation, it was said that paragraphs 22 to 30 did not appropriately reflect the fact that, pursuant to the legal tradition of some countries, creation of security interests in the context of privately financed infrastructure projects (in particular as regards assets in public ownership) was subject to restrictions designed to protect the public interest. Therefore, the advice given in the paragraphs was inconsistent with those legal systems. It was agreed that the discussion in paragraphs 22 to 30 of the draft chapter should be brought into line with the discussion of security interests contained in paragraphs 32 to 40 of draft chapter IV, "The project agreement" (A/CN.9/458/Add.5). It was also agreed that the draft chapter should appropriately reflect the fact that there existed legal obstacles to the creation of security interests in some countries due to the inalienable nature of certain categories of assets in public ownership.

274. It was pointed out that proceeds or receivables related to the provision of goods or services by the concessionaire might not always be based on a contract between the concessionaire and its customers but on other types of relationships which in some legal systems were not regarded as contracts. That situation should be taken into account in paragraph 28.

275. It was proposed that in paragraph 24, possibly in the penultimate sentence, it should be indicated that limitations in the remedies available under the laws of the host country would add to the cost of lending to projects in that country.

Company law (paras. 31-34)

276. No substantive comments were made on paragraphs 31 to 34.

Accounting practices (para. 35)

277. It was agreed that the third sentence of paragraph 35, if retained in the draft chapter, should become a separate paragraph.

278. A suggestion was made that the discussion of accounting practices should refer to the advisability of using the services of professional accountants or accounting auditors. It was questioned whether the concept of "modern" and "generally accepted" accounting practices was appropriate and understandable in the same manner in different countries; possible alternative expressions that were mentioned were "contemporary" or "internationally acceptable" accounting practices.

Contract law (paras. 36-37)

279. It was considered that paragraphs 36 and 37 should be adjusted to take into account the fact that in some countries some of the contracts entered into by the concessionaire did not fall under the category of contracts governed by commercial or civil law but were qualified as public or administrative contracts. The discussion in paragraphs 36 and 37 should be restricted to private contract law and the title should be modified accordingly.

Rules on government contracts and administrative law (paras. 38-41)

280. Support was expressed for the substance of paragraphs 38 to 41.

Insolvency law (paras. 42-44)

281. It was observed that, under some legal systems, limits might exist for the creditors' and the debtor's freedom to enter into agreements establishing precedence of certain claims over other liabilities of the debtor (which was discussed in paragraph 42) and that that circumstance should be clarified. It was suggested that the words "economically viable", in the second sentence of paragraph 42, should be deleted. As to paragraph 43, it was considered that the word "priority" was not suitable to describe the relationship between the insolvency administrator and creditors.

Tax law (paras. 45-50)

282. It was observed that, in some legal systems, the level of taxation would change from year to year depending on changes in social conditions. In such countries, investors might be favoured under economic circumstances that would permit the levels of taxation to decline over time. It was suggested that, therefore, the wording of paragraph 46, which stressed the importance of stability and predictability in the tax regime, should be amended to reflect that possibility.

Environmental protection (paras. 51-54)

283. It was noted that the overall importance of environmental protection legislation had been addressed elsewhere in the draft legislative guide and that the focus of the discussion in the draft chapter should be on measures that could be included in such legislation in order to reduce the perceived risks associated with investment in privately financed infrastructure projects. It was pointed out that, in addition to the international instruments mentioned in paragraph 51, reference should also be made to various regional instruments. It was also suggested that mention should be made of the need for, and benefit of, environmental impact studies. The proposal was made that paragraph 54, which was felt to touch upon sensitive policy issues, was not needed in the context of the draft chapter and should be deleted.

Consumer protection laws (para. 55)

284. It was observed that a single paragraph constituted rather brief treatment of consumer protection laws, particularly in comparison with the discussions on other areas of law that were contained in the draft chapter. It was pointed out that the legislatures in some regions had become increasingly sensitive to those issues. It was suggested that a cross-reference should be added to the provisions of draft chapter VIII, "Settlement of disputes" (A/CN.9/458/Add.9), that dealt with dispute settlement remedies for consumers. It was also suggested that the reference to the concessionaire's right to discontinue services to customers who "fail to pay" might be rephrased more kindly.

Anti-corruption measures (paras. 56-58)

285. It was suggested that the order of paragraphs 56 and 57 should be reversed. It was also suggested that such measures might include steps to criminalize acts of corruption, bribery and related illicit practices in order to dissuade such activities. It was pointed out that the second sentence in paragraph 56, which called for "review" of the rules covering the functioning of contracting authorities and the monitoring of public contracts, might have a negative implication in some languages and should be reworded. It was suggested that, if regional initiatives were to be covered in paragraph 58, then all regions should be included.

International agreements (paras. 59-63)

286. It was suggested that the phrase "in addition to other international agreements mentioned throughout the draft legislative guide" should be added to paragraph 59, so that the ensuing discussion of certain international agreements would not appear to exclude others. It was suggested that regional agreements might also be mentioned.

Chapter VIII. Settlement of disputes (A/CN.9/458/Add.9)

General remarks

287. As a general observation, it was said that, while basic information about the methods of dispute settlement was useful (in particular about those methods that were not widely known or had developed recently), the draft chapter should be more geared towards privately financed infrastructure projects and should draw on practical experiences in various countries. It was widely held that, if the discussions were not sufficiently tailored to the subject of the guide and more concise, critical messages to legislators would not be sufficiently conspicuous.

288. Statements were made to the effect that the draft chapter should refer to the phases of a privately financed infrastructure project and the different methods of dispute settlement that were suitable for, or were likely to be used in, each phase. It was suggested that the draft chapter should discuss different methods of dispute settlement from the viewpoint of how they could contribute to the smooth execution of projects and prevention of full-blown disputes.

289. To the extent that grievances against decisions by regulatory bodies would be dealt with in the draft chapter, it was suggested that the draft chapter should also address the question of the use of non-judicial grievance settlement mechanisms such as expert panels, advisory bodies or arbitration.

290. It was generally observed that some countries, in particular those where contracts between the contracting authority and the concessionaire were regarded as administrative contracts, traditionally imposed broad limits to the freedom to agree to arbitration. While some exceptions to those limits had been introduced, those exceptions, at least in some of those countries, were typically narrowly circumscribed by legislation or were based on a treaty. Furthermore, the existence of those exceptions did not change the principle that privately financed infrastructure projects were regarded as administrative contracts and that, therefore, disputes arising under those contracts were non-arbitrable. It was stated that the draft chapter should properly reflect the position of those legal systems.

291. As to arbitration as a method of dispute settlement, it was said that the draft chapter appeared to underestimate the potential difficulties of that method, such as the potentially high cost of proceedings, the possibility of delays, or the potentially negative implications of confidentiality of proceedings.

292. On the other hand, it was stressed that an arbitration clause in the project agreement was regarded by many investors as an assurance that any dispute would be resolved efficiently and fairly and that, since that assurance would often be seen as a crucial condition to attract private capital to projects, the contracting authority should be left free to agree to arbitration. Moreover, it was suggested that the draft chapter should place greater emphasis on the freedom to choose the place of arbitration (in the host country or elsewhere, which would have implications as to the possibility of courts of the host country to intervene in the arbitral proceedings), the freedom to choose arbitrators and the confidentiality of proceedings. It was, however, added that, prima facie, the place where the project was being carried out was most appropriate as the place of arbitration (because evidence was there and because the cost of proceedings were most likely to be the lowest there).

293. It was suggested that the draft chapter should distinguish between "domestic" arbitration (i.e. arbitration between persons having their places of business in the jurisdiction where the arbitration took place) and "international" arbitration (i.e. arbitration between persons having their places of business in different jurisdictions or arbitration that for another reason was considered as being

international); that distinction, and the implications thereof, was relevant in jurisdictions where different legislative provisions applied to domestic and international arbitration. In addition, more emphasis should be placed on the dispute settlement mechanism of the International Centre for the Settlement of Investment Disputes established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 1965).

Disputes between the contracting authority and the concessionaire (recommendation 1 and paras. 4-64)

294. As to recommendation 1 (a), it was said that the significance of the expression "unnecessary" was unclear and that it should be deleted. While some support was expressed for its deletion, statements were made to the effect that the expression attempted to indicate, correctly, that the advice to remove statutory limitations to the contracting authority's freedom to agree to dispute settlement mechanisms was limited to those limitations which were regarded as unnecessary pursuant to the sovereign assessment of the host country; thus, a clearer formulation was preferable to deletion.

295. As to paragraphs 2 (b) and 2 (c) of the notes, it was noted that, in some legal systems, some of the items mentioned therein might not be regarded as contracts or as commercial contracts (e.g. payment of a fee for the use of a tollroad or contracts entered into by the contracting authority).

296. It was suggested that paragraph 8 should mention that arbitral proceedings might also be based on a statutory provision rather than, as was typical, on an arbitration agreement. It was also said that the statement about the enforceability of arbitral awards needed to be nuanced by an explanation that in some jurisdictions the enforcement of an award required a judicial decision (*exequatur*) and that the enforcement was preceded by a verification, albeit limited, that certain fundamental principles of public policy had not been violated.

297. It was questioned whether paragraphs 11 and 12 (concerning negotiation) were needed. As to the settlement of disagreements by a referee or a dispute settlement board (paras. 21-29), which was common in construction contracts, it was suggested that the experience of using those dispute settlement techniques during the post-construction period might be explored as to their applicability during the performance of the project agreement. It was requested that in paragraph 23 the legal nature of a decision by the referee or a dispute settlement board be clarified.

298. A number of statements were made regarding the question of sovereign immunity, which was dealt with in recommendation 1 (b) and paragraphs 51 to 55. It was said that the question whether the host Government or the contracting authority was able to invoke sovereign immunity (either as a bar to jurisdiction or as a bar against execution) was considered as one of the core issues by investors. As to the position of Governments, it was stated that public policy considerations dictated that sovereign immunity should not be automatically waived or that any waiver should be left to the discretion of the Government. According to one view, the guide should not deal with such a sensitive question, on which no clear-cut result was obtainable; if the question was to be touched upon, the guide should not contain suggestions. According to another view, there was a need to revise national laws on that issue since what was needed was clarity; in particular investors needed clarity as to whether the contracting authority, which assumed obligations by concluding the project agreement, was deemed to have waived its immunity. As to the formulation of recommendation 1 (b), it was criticized either for being unclear as to what it sought to achieve or for being too intrusive on this politically sensitive point. In response, however, it was considered that, in view of the fact that investors needed clarity on the point, and bearing in mind that no harmonized solution on the question had been reached yet, the purpose and thrust of the recommendation should not be to suggest any particular solution, but merely to call upon States to clarify, as far as possible, what the law on sovereign immunity in the State was. It was added that several aspects of the question needed to be clarified, including whether immunity extended to foreign or domestic forums.

Settlement of commercial disputes (legislative recommendation 2 and paras. 65-76)

299. It was suggested that the title of recommendation 2 might lead to confusion and should be amended to indicate that it was concerned with settlement of disputes that arose between the concessionaire and entities other than the contracting authority.

300. Concern was expressed over both the substance and form of paragraphs 60 through 64, which addressed judicial proceedings. It was felt that the discussions, in terms of both their length and tone, were not sufficiently

balanced with the discussions that dealt with other dispute settlement mechanisms in the rest of the draft chapter. Whereas treatment of alternative methods, such as arbitration, for example, included an explanation of that mechanism, no similar description was provided regarding judicial proceedings. Moreover, those paragraphs seemed to imply that judicial proceedings were not a good approach to the settlement of disputes. It was suggested that those paragraphs should be worded more subtly. In response to the comment that it was inappropriate to suggest in paragraph 62 that the judiciary might be biased in favour of the contracting authority, it was pointed out that the intended meaning was that the parties to the project agreement might have that concern.

301. It was suggested that in the future revision of paragraph 65, it might be desirable to bear in mind the determination of what would constitute a commercial contract. A fuel supply contract by a government agency was given as an example with respect to which such a determination was relevant. Another view was that it would not be advisable to enter into discussions in this draft chapter as to the meaning of a commercial contract or a commercial dispute, the meaning of which varied greatly according to the legal system concerned.

302. It was observed that conciliation was not usually provided for in "corporate instruments", a term that appeared in the heading of paragraph 67 and which was considered somewhat unclear. It was also suggested that the term "voluntary" should be clarified as it suggested that there existed both "voluntary" and "involuntary" conciliation.

303. It was suggested that the contents of paragraph 69, which described construction contracts, did not specifically relate to dispute settlement. It was also suggested that the discussion of construction contracts should mention systems of dispute settlement developed by the Fédération Internationale des Ingénieurs-Conseils (FIDIC).

Disputes involving other parties (legislative recommendations 3 and 4 and paras. 77-82)

304. It was pointed out that what might be envisioned as the "consumers" of the services or products that were produced by a concessionaire could be quite different. In one situation, the consumer might be a single government-owned utility company that would purchase power or water from the concessionaire; in another situation, the consumers might be several thousands of individual users of a toll road. The type of dispute settlement mechanisms that would be selected would have to be appropriately tailored to each situation. It was pointed out that, although that distinction was made in the notes, it needed to be incorporated into recommendation 3.

305. The view was expressed that, as privately financed infrastructure projects would grow in number and volume, disputes with consumers would become more frequent and would result in greater need for dispute settlement mechanisms. It was felt that recommendation 4, which addressed this matter, was important, but that the subject was dealt with too briefly in the accompanying notes.

306. Another view was that it would be important for consumers to have the right to resort to the courts for the resolution of such disputes. It was considered advisable that the host country should provide for legislation that would contain provisions against consumer fraud and false advertising, and that would recognize and enable consumer protection agencies to initiate litigation.

307. Some of the issues that were suggested for further discussion included the following: the relationship between regulatory bodies and arbitral proceedings, and the treatment of confidential information disclosed during the settlement of a dispute with a public regulatory body.

Chapter III

Electronic commerce

A. Draft uniform rules on electronic signatures

308. It was recalled that the Commission, at its thirtieth session, in 1997, had entrusted the Working Group on Electronic Commerce with the preparation of uniform rules on the legal issues of digital signatures and certification authorities. With respect to the exact scope and form of such uniform rules, it was generally agreed at that session that no decision could be made at such an early stage of the process. In addition, it was felt that, while the Working Group might appropriately focus its attention on issues of digital signatures in view of the apparently predominant role played by public-key cryptography in the emerging electronic-commerce practice, the uniform rules to be prepared should be consistent with the media-neutral approach taken in the UNCITRAL Model Law on Electronic Commerce. Thus, the uniform rules should not

discourage the use of other authentication techniques. Moreover, in dealing with public-key cryptography, those uniform rules might need to accommodate various levels of security and to recognize the various legal effects and levels of liability corresponding to the various types of services being provided in the context of digital signatures. With respect to certification authorities, while the value of market-driven standards was recognized by the Commission, it was widely felt that the Working Group might appropriately envisage the establishment of a minimum set of standards to be met by certification authorities, in particular where cross-border certification was sought.[16]

309. At its thirty-first session, in 1998, the Commission noted that the Working Group, in its preparation of draft uniform rules on electronic signatures throughout its thirty-first and thirty-second sessions, had experienced manifest difficulties in reaching a common understanding of the new legal issues arising from the increased use of digital and other electronic signatures. It was also noted that a consensus was still to be found as to how those issues might be addressed in an internationally acceptable legal framework. However, it was generally felt by the Commission that the progress achieved so far indicated that the draft uniform rules on electronic signatures were progressively being shaped into a workable structure. The Commission reaffirmed the decision made at its thirtieth session as to the feasibility of preparing such uniform rules[17] and expressed its confidence that more progress could be accomplished by the Working Group at its thirty-third session (New York, 29 June-10 July 1998) on the basis of the revised draft prepared by the Secretariat (A/CN.9/WG.IV/WP.76). In the context of that discussion, the Commission noted with satisfaction that the Working Group had become generally recognized as a particularly important international forum for the exchange of views regarding the legal issues of electronic commerce and for the preparation of solutions to those issues.[18]

310. At the current session, the Commission had before it the report of the Working Group on the work of its thirty-third and thirty-fourth sessions (A/CN.9/454 and 457). The Commission expressed its appreciation for the efforts accomplished by the Working Group in its preparation of draft uniform rules on electronic signatures. While it was generally agreed that significant progress had been made at those sessions in the understanding of the legal issues of electronic signatures, it was also felt that the Working Group had been faced with difficulties in the building of a consensus as to the legislative policy on which the uniform rules should be based.

311. A view was expressed that the approach currently taken by the Working Group did not sufficiently reflect the business need for flexibility in the use of electronic signatures and other authentication techniques. According to that view, the uniform rules as currently envisaged by the Working Group placed excessive emphasis on digital signature techniques and, within the sphere of digital signatures, on a specific application involving third-party certification. Accordingly, it was suggested that work on electronic signatures by the Working Group should either be limited to the legal issues of cross-border certification or be postponed altogether until market practices were better established. A related view was that, for the purposes of international trade, most of the legal issues arising from the use of electronic signatures had already been solved in the UNCITRAL Model Law on Electronic Commerce. While regulation dealing with certain uses of electronic signatures might be needed outside the scope of commercial law, the Working Group should not become involved in any such regulatory activity.

312. The widely prevailing view was that the Working Group should pursue its task on the basis of its original mandate (see above, para. 308). With respect to the need for uniform rules on electronic signatures, it was explained that, in many countries, guidance from UNCITRAL was expected by governmental and legislative authorities that were in the process of preparing legislation on electronic signature issues, including the establishment of public key infrastructures (PKI) or other projects on closely related matters (A/CN.9/457, para. 16). As to the decision made by the Working Group to focus on PKI issues and PKI terminology, it was recalled that the interplay of relationships between three distinct types of parties (i.e. key holders, certification authorities and relying parties) corresponded to one possible PKI model, but that other models were conceivable, for example, where no independent certification authority was involved. One of the main benefits to be drawn from focusing on PKI issues was to facilitate the structuring of uniform rules by reference to three functions (or roles) with respect to key pairs, namely, the key issuer (or subscriber) function, the certification function and the relying function. It was generally agreed that those three functions were common to all PKI models. It was also agreed that those three functions should be dealt with irrespective of whether they were in fact served by three separate entities or whether

two of those functions were served by the same person (e.g. where the certification authority was also a relying party). In addition, it was widely felt that focusing on the functions typical of PKI and not on any specific model might make it easier to develop a fully media-neutral rule at a later stage (A/CN.9/457, para. 68).

313. After discussion, the Commission reaffirmed its earlier decisions as to the feasibility of preparing such uniform rules (see above, para. 309), and expressed its confidence that more progress could be accomplished by the Working Group at its forthcoming sessions.

314. As to the time-frame within which the Working Group might be expected to fulfil its mandate, a suggestion was made that the draft uniform rules should be ready for consideration and adoption by the Commission at its thirty-third session. The prevailing view was that no specific time-frame should be set. However, the Commission urged the Working Group to proceed expeditiously with the completion of the draft uniform rules. In the context of that discussion, an appeal was made to all delegations to renew their commitment to active participation in the building of a consensus with respect to the scope and contents of the draft uniform rules.

B. Future work in the field of electronic signatures

315. Various suggestions were made with respect to future work in the field of electronic commerce, for possible consideration by the Commission and the Working Group after completion of the uniform rules on electronic signatures. It was recalled that, at the close of the thirty-second session of the Working Group, a proposal had been made that the Working Group might wish to give preliminary consideration to undertaking the preparation of an international convention based on relevant provisions of the UNCITRAL Model Law on Electronic Commerce and of the draft uniform rules (A/CN.9/446, para. 212).[19] The Commission was informed that interest had been expressed in a number of countries in the preparation of such an instrument.

316. The attention of the Commission was drawn to a draft recommendation adopted on 15 March 1999 by the Centre for the Facilitation of Procedures and Practices for Administration, Commerce and Transport (CEFACT) of the Economic Commission for Europe of the Secretariat. That text recommended "that UNCITRAL consider the actions necessary to ensure that references to 'writing', 'signature' and 'document' in conventions and agreements relating to international trade allow for electronic equivalents". Support was expressed for the preparation of an omnibus protocol to amend multilateral treaty regimes to facilitate the increased use of electronic commerce.

317. Other items suggested for future work included: electronic transactional and contract law; electronic transfer of rights in tangible goods; electronic transfer of intangible rights; rights in electronic data and software (possibly in cooperation with the World Intellectual Property Organization); standard terms for electronic contracting (possibly in cooperation with the International Chamber of Commerce and the Internet Law and Policy Forum); applicable law and jurisdiction (possibly in cooperation with the Hague Conference on Private International Law); and on-line dispute settlement systems.[20]

318. The Commission took note of the above proposals. It was decided that, upon completing its current task, namely, the preparation of draft uniform rules on electronic signatures, the Working Group would be expected, in the context of its general advisory function regarding the issues of electronic commerce, to examine some or all of the above-mentioned items, as well as any additional items, with a view to making more specific proposals for future work by the Commission.

Chapter IV

Assignment in receivables financing

319. It was recalled that the Commission had considered legal problems in the area of assignment at its twenty-sixth to twenty-eighth sessions (1993-1995)[21] and had entrusted, at its twenty-eighth session, in 1995, the Working Group on International Contract Practices with the task of preparing a uniform law on assignment in receivables financing.[22]

320. It was noted that the Working Group had commenced its work at its twenty-fourth session and had held five sessions between the twenty-eighth and the thirty-first sessions of the Commission. It was also noted that, at its twenty-fourth session, the Working Group had been urged to strive for a legal text aimed at increasing the availability of lower-cost credit (A/CN.9/420, para. 16). In addition, it was noted that, at its twenty-fifth and twenty-sixth

sessions, the Working Group had decided to proceed with its work on the assumption that the text being prepared would take the form of a convention (A/CN.9/432, para. 28) and would include private international law provisions (A/CN.9/434, para. 262). Moreover, it was noted that at its twenty-seventh session, the Working Group had decided that basic priority rules of the draft Convention would be private international law rules, and that the substantive law priority rules of the draft Convention would be subject to an opt-in by States (A/CN.9/445, paras. 26-27). At its twenty-eighth session, the Working Group had adopted the substance of draft articles 14-16, dealing with the relationship between the assignor and the assignee, and draft articles 18-22, dealing with the relationship between the assignee and the debtor (A/CN.9/447, paras. 161-164).

321. At its thirty-second session, the Commission had before it the reports of the twenty-ninth and thirtieth sessions of the Working Group (A/CN.9/455 and 456). It was noted that, at its twenty-ninth session, the Working Group had adopted the substance of the preamble and draft articles 1 (1) and 1 (2) (scope of application), 5 (g)-5 (j) (definitions), 18 (5 *bis*) (debtor's discharge), 23-33 (priority and private international law rules) and 41-50 (final provisions) (A/CN.9/455, para. 17). At its thirtieth session, it had adopted the title, the preamble and draft articles 1-24 (A/CN.9/456, para. 18). As a result, the whole of the draft Convention had been adopted with the exception of the optional substantive law priority rules.

322. Noting that the draft Convention had attracted the interest of the international trade and finance community, the Commission expressed its appreciation for the significant progress achieved by the Working Group. It was widely felt that the draft Convention had the potential of increasing the availability of credit at more affordable rates. It was stated that the fact that credit on the basis of international receivables was either not available at all or was available only at a high cost could give rise to serious obstacles to international trade. It was also observed that that situation placed parties from developing countries at a competitive disadvantage, to the extent that they had limited access to lower-cost credit.

323. At the same time, the Commission noted that a number of specific questions remained to be addressed by the Working Group, including the questions: whether the draft Convention would apply only to assignments in a financing context or to other assignments as well; whether certain assignments, such as those involved in securities and clearing-house transactions, should be excluded or simply dealt with differently; whether the location of a corporation should be defined, for the purposes of the scope of application of the draft Convention and of the priority rules, by reference to its place of business, place of incorporation or place of central administration; whether anti-assignment clauses contained in public procurement contracts should be treated differently from such clauses in other types of contracts; whether priority with respect to proceeds of receivables should be treated in the same way as priority with respect to receivables; whether the private international law rules should be used to fill gaps in the substantive law provisions of the draft Convention or to unify the private international law on assignment at large (i.e. so as to apply beyond the scope of application of the draft Convention); and whether the optional substantive law priority rules should be expanded or rather remain as general principles.

324. Some delegates expressed views concerning the way in which those matters might be addressed by the Working Group, including: that the draft Convention should apply only to financing transactions; that domestic practices should not be adversely affected; that particular caution should be exercised in the treatment of certain financing transactions, such as transactions relating to derivatives and clearing-house activities, so as to avoid unsettling well-functioning practices; that the exclusion of assignments of non-contractual receivables should be reconsidered; that location of a corporation should be defined in an appropriate way (e.g. by reference to its statutory seat, place of central administration or principal place of business). The view was also expressed that the draft Convention should recognize: the principle of party autonomy as to the relationship between the assignor and the assignee; the principle of debtor-protection as to the relationship between the assignee and the debtor; and the need for certainty as to the rights of third parties, such as creditors of the assignor.

325. As to the provision of the draft Convention giving the assignee a right *in rem* in proceeds of receivables, the concern was expressed that it might be inconsistent with fundamental principles of law in some countries. In response, it was observed that, in line with law currently existing in many countries, such a right *in rem* of the assignee in proceeds of receivables was recognized, under the draft Convention, only in limited cases (i.e. where the assignor had received payment in cash on behalf of the assignee and held the proceeds in a separate and easily

identifiable account). In any case, it was stated, States would have to weigh the potential minimal discomfort of such a provision against its potential, significant beneficial impact on the cost and the availability of credit, in the context of transactions, such as securitization or undisclosed invoice discounting. Without discussing those statements and views, the Commission referred them to the Working Group.

326. With regard to the scope of the draft Convention, the question was raised as to whether it was within the mandate of the Working Group to decide that the draft Convention would apply to transactions outside a strictly financing context. In response, the Commission reaffirmed the flexible mandate given to the Working Group to determine how broad or narrow the scope of application of the draft Convention should be.

327. As to the relationship between, on the one hand, the draft Convention and, on the other hand, the Convention on International Factoring (Ottawa, 1988), the European Union Convention on the Law Applicable to Contractual Obligations (Rome, 1980) and the draft Convention on International Interests in Mobile Equipment and its protocols on aircraft, space equipment and railway rolling stock ("the Unidroit draft Convention") currently being prepared by a joint group of the International Institute for the Unification of Private Law (Unidroit), the International Civil Aviation Organization and other organizations, the Commission expressed its appreciation for the progress made by the Working Group in its efforts to avoid or to minimize the potential for conflicts.

328. With regard to the relationship between the draft Convention and the Unidroit draft Convention, the Commission noted that, at its thirtieth session, the Working Group had considered ways in which conflicts could be avoided (A/CN.9/456, paras. 232-239). It was noted that, at that session, the Working Group had identified two ways, i.e. to exclude the assignment of receivables arising from the sale or lease of high-value equipment from the scope of application of the draft Convention or the Unidroit draft Convention and, rather than dealing with the matter by way of exclusions, to settle it by giving precedence to one or the other text if a conflict arose.

329. A number of views were expressed as to the way in which that matter could be addressed by the Working Group. One view was that assignments of receivables arising from the sale or lease of high-value equipment should be excluded from the draft Convention, since such receivables were in practice part of equipment financing. Another view was that, rather than excluding such assignments from the scope of the draft Convention in all cases, whether or not the Unidroit draft Convention applied (an approach that would inadvertently result in gaps if the Unidroit draft Convention were not widely adopted), it might be preferable to give precedence to the Unidroit draft Convention with regard to such assignments only if the Unidroit draft Convention applied in a particular case. In that connection, it was suggested that the question of which text might prevail in the case of conflict might be approached differently depending on the types of equipment involved in each particular case, since, in some equipment-financing practices, receivables were part of equipment-financing, while, in other such practices, that was not the case. Yet another view was that the possibility of excluding certain assignments from the Unidroit draft Convention should also be considered. The Commission referred those views to the Working Group.

330. The Commission expressed appreciation for the work accomplished by the Working Group and requested the Working Group to proceed with its work expeditiously so as to make it possible for the draft Convention, along with the report of the next session of the Working Group, to be circulated to Governments for comments in good time and for the draft Convention to be considered by the Commission for adoption at its thirty-third session (2000). As regards the subsequent procedure for adopting the draft Convention, the Commission noted that it would have to decide at its next session whether it should recommend adoption by the General Assembly or by a diplomatic conference to be specially convened by the General Assembly for that purpose.

Chapter V

Monitoring the implementation of the 1958 New York Convention

331. It was recalled that the Commission, at its twenty-eighth session in 1995, had approved the project, undertaken jointly with Committee D of the International Bar Association, aimed at monitoring the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).[23] It was stressed that the purpose of the project, as approved by the Commission, was limited to that aim and, in particular, its purpose was not to monitor individual

court decisions applying the Convention. In order to be able to prepare a report on the subject, the Secretariat had sent to the States parties to the Convention a questionnaire relating to the legal regime in those States governing the recognition and enforcement of foreign awards.

332. Up until the current session of the Commission, the Secretariat had received 59 replies to the questionnaire (out of, currently, 121 States parties). The Commission called upon the States parties to the Convention that had not yet replied to the questionnaire to do so as soon as possible or, to the extent necessary, to inform the Secretariat about any new developments since their previous replies to the questionnaire. The Secretariat was requested to prepare, for a future session of the Commission, a note presenting the findings based on the analysis of the information gathered.

Chapter VI

International commercial arbitration: possible future work

A. Introduction

333. The Commission, during its thirty-first session, held a special commemorative New York Convention Day on 10 June 1998 to celebrate the fortieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958). In addition to representatives of States members of the Commission and observers, some 300 invited persons participated in the event. The opening speech was made by the Secretary-General of the United Nations. In addition to speeches by former participants in the diplomatic conference that adopted the Convention, leading arbitration experts gave reports on matters such as the promotion of the Convention, its enactment and application. Reports were also given on matters beyond the Convention itself, such as the interplay between the Convention and other international legal texts on international commercial arbitration and on practical difficulties that were encountered in practice but were not addressed in existing legislative or non-legislative texts on arbitration.[24]

334. In reports presented at that commemorative conference, various suggestions were made for presenting to the Commission some of the problems identified in practice so as to enable it to consider whether any work by the Commission would be desirable and feasible.

335. The Commission, at its thirty-first session in 1998, with reference to the discussions at the New York Convention Day, considered that it would be useful to engage in a consideration of possible future work in the area of arbitration at its thirty-second session in 1999. It requested the Secretariat to prepare a note that would serve as a basis for the considerations of the Commission.[25]

336. At the current session, the Commission had before it the requested note as document A/CN.9/460. The note drew on ideas, suggestions and considerations expressed in different contexts, such as the New York Convention Day, the Congress of the International Council for Commercial Arbitration (Paris, 3-6 May 1998),[26] and other international conferences and forums, such as the 1998 "Freshfields" lecture.[27] The note discussed some of the issues and problems identified in arbitral practice in order to facilitate a discussion in the Commission as to whether it wished to put any of those issues on its work programme. The considerations of the Commission on those issues is reflected below (paras. 337-376 and para. 380). During the deliberations, a number of other issues were mentioned as potentially suitable for future work by the Commission (paras. 339 and 340).

B. General remarks

337. The Commission welcomed the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration. It was generally considered that the time had arrived to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985) as well as the use of the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules, and to evaluate in the universal forum of the Commission the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.

338. The Commission undertook its deliberations with an open mind as to the ultimate form that future work of the Commission might take. It was agreed that any considerations as to the form would, at the current time, be tentative, leaving firmer decisions to be taken later as the substance of proposed solutions became clearer. Uniform provisions might, for example, take the form of a legislative text (such as model legislative provisions or a

treaty) or a non-legislative text (such as a model contractual rule or a practice guide). It was stressed that, even if an international treaty were to be considered, it was not intended to be a modification of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (see also below, paras. 347-349). It was thought that, even if ultimately no new uniform text would be prepared, an in-depth discussion by delegates from all major legal, social and economic systems represented in the Commission, possibly with suggestions for uniform interpretation, would be a useful contribution to the practice of international commercial arbitration.

339. At various stages of the discussion, the following topics, in addition to those contained in document A/CN.9/460, were mentioned as potentially worthy of being taken up by the Commission at an appropriate future time:

(a) Gaps in contracts left by the parties and filling of those gaps by a third person or an arbitral tribunal on the basis of an authorization of the parties;

(b) Changed circumstances after the conclusion of a contract and the possibility that the parties entrusted a third person or an arbitral tribunal with the adaptation of the contract to changed circumstances;

(c) Freedom of parties to be represented in arbitral proceedings by persons of their choice and the issue of limits to that freedom based on, for example, nationality or membership in a professional association;

(d) Questions relating to the interpretation of legislative provisions such as those in article II (3) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (or article 8 (1) of the UNCITRAL Model Law on International Commercial Arbitration), which in practice led to divergent results, in particular the question of the court's terms of reference (i) in deciding whether to refer the parties to arbitration, (ii) in considering whether the arbitration agreement was null and void, inoperative or incapable of being performed, and (iii) where the defendant invoked the fact that an arbitration proceeding was pending or that an arbitral award had been issued;

(e) Questions relating to cases where a foreign court judgement was presented with a request for its recognition or enforcement, but where the respondent, by way of defence, invoked (i) the existence of an arbitration agreement, or (ii) the fact that an arbitration proceeding was pending, or (iii) the fact that an arbitral award had been issued in the same matter. It was noted that those instances were often not addressed by treaties dealing with recognition and enforcement of foreign court judgements. Difficulties arose in particular where the applicable treaty was designed to facilitate recognition and enforcement of court judgements, but the treaty itself did not allow recognition or enforcement to be refused on the ground that the dispute dealt with by the judgement was covered by an arbitration agreement, was being considered in a pending arbitral proceeding, or was the subject matter of an arbitral award.

C. Discussion of specific items

a. Conciliation (A/CN.9/460, paras. 8-19)

340. There was general agreement that the three issues identified in the note by the Secretariat (namely: admissibility of certain evidence in subsequent judicial or arbitral proceedings; role of the conciliator in subsequent proceedings; and procedures for enforcing settlement agreements) were particularly important, and were the object of ongoing discussions in professional circles involved in dispute settlement (see A/CN.9/460, paras. 8 to 19). It was widely felt that, in addition to those three issues, the possible interruption of limitation periods as a result of the commencement of conciliation proceedings was worthy of consideration.

341. The view was expressed that the issues of conciliation might not easily lend themselves to international unification by way of uniform legislation. The desirability of preparing uniform legislative rules was questioned in view of a general concern that the flexibility of rules governing conciliation should be preserved. It was stated that most procedural difficulties that might arise in the field of conciliation could probably be solved by agreement between the parties.

342. The widely prevailing view, however, was that the Commission should explore the possibility of preparing uniform legislative rules to support the increased use of conciliation. It was explained that, while certain issues (such as the admissibility of certain evidence in subsequent judicial or arbitral proceedings, or the role of the conciliator in subsequent proceedings) could typically be solved by reference to sets of rules such as the UNCITRAL Conciliation Rules, there were many cases where no such rules were agreed upon. The conciliation process might thus benefit from the establishment of non-mandatory

legislative provisions that would apply when the parties mutually desired to conciliate but had not agreed on a set of conciliation rules. Moreover, in countries where agreements as to the admissibility of certain kinds of evidence were of uncertain effect, uniform legislation might provide a useful clarification. In addition, it was pointed out with respect to issues such as facilitating the enforcement of settlement agreements resulting from conciliation (e.g. enforcing them in the same way as arbitral awards) and the effect of conciliation with respect to the interruption of a limitation period, that the level of predictability and certainty required to foster conciliation could only be achieved through legislation. It was widely felt that those issues should be dealt with by the Commission on a high priority basis.

343. After discussion, the Commission decided that a working group to be entrusted with the subject matter (see below, para. 380) should consider whether, with a view to encouraging and facilitating conciliation, it would be useful for it to prepare harmonized legislative model provisions on conciliation that would deal with the above questions, and possibly others.

b. Requirement of written form for arbitration agreement (A/CN.9/460, paras. 20-31)

344. It was widely considered that article II (2) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) (which required the arbitration agreement to be in written form "in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams"), and subsequent uniform provisions modelled on that article, were often regarded as outdated. The discussion thus focused on the extent to which modernization of the New York Convention was needed in respect of the formation of the arbitration agreement, as well as the nature and the urgency of any work that might be undertaken by the Commission for such modernization. The view was expressed that, in the majority of cases, parties had no difficulty in complying with the current form requirements, that those requirements compelled the parties to consider carefully the exclusion of court jurisdiction and that, therefore, if any work should be undertaken, it should be limited to the formulation of a practice guide. While that view received some support, the Commission decided that future work was necessary with respect to matters arising in connection with article II (2) of the New York Convention, and that legislative work was among the options to be considered.

345. As regards the scope of future work with respect to article II (2) of the New York Convention, it was widely felt that work might be needed in connection with the two general issues addressed in the note by the Secretariat (A/CN.9/460, paras. 22-31), namely: the issue of the written form requirement and its implications with respect to modern means of communication and electronic commerce; and the more substantial issues of consent by the parties to an arbitration agreement where the arbitration agreement was not embodied in an exchange of letters or telegrams.

346. In addition to those two general issues, it was pointed out that special attention might need to be given to specific fact situations that posed serious problems under the New York Convention, including the following: tacit or oral acceptance of a written purchase order or of a written sales confirmation; an orally concluded contract referring to written general conditions (e.g. oral reference to a form of salvage); or, certain brokers' notes, bills of lading and other instruments or contracts transferring rights or obligations to non-signing third parties (i.e. third parties who were not party to the original agreement). Examples of such transfers to third parties included the following: universal transfer of assets (successions, mergers, demergers and acquisitions of companies); specific transfer of assets (transfer of contract or assignment of receivables or debts, novation, subrogation, stipulation in favour of a third party (*stipulation pour autrui*)); or, in the case of multiple parties, or groups of contracts or groups of companies, implicit extension of the application of the arbitration agreement to persons who were not expressly parties thereto (A/CN.9/460, para. 25).

347. Various views were expressed as to the means through which modernization of the New York Convention could be sought. One view was that the issues related to the formation of the arbitration clause should be dealt with by way of an additional protocol to the New York Convention. It was explained that redrafting, or promoting uniform interpretation of, article II (2) could only be achieved with the required level of authority through treaty provisions similar in nature to those of the New York Convention. While support was expressed for that view, concern was expressed that any attempt to revise the New York Convention might jeopardize the excellent results reached over 40 years of international recognition and enforcement of foreign arbitral awards through worldwide acceptance

of that Convention. In response to that concern, however, it was pointed out that the very success of the New York Convention and its establishment as a world standard should make it possible for UNCITRAL to undertake a limited overhaul of the text if such work was needed to adapt its provisions to changing business realities, and to maintain or restore its central status in the field of international commercial arbitration.

348. Another view was that, while no attempt should be made to revise the New York Convention directly, the desired result with respect to article II (2) might be achieved through model legislation. This could be prepared for the benefit of national legislators with a view to superseding the outdated provisions of article II (2) by relying on the more-favourable-law provision of article VII of the Convention. While support was expressed in favour of that view, it was noted that such a solution could be pursued only if article II (2) were no longer to be interpreted as a uniform rule establishing the minimum requirement of writing, but would instead be understood as establishing the maximum requirement of form. It was pointed out that the worldwide acceptance of such an interpretation was currently doubtful and could only become established as the result of a lengthy harmonization process based on case law. However, it was suggested that the Commission could usefully contribute to speeding up that process by elaborating (in addition to model legislation) guidelines or other non-binding material to be used by courts as guidance from the international community in the application of the New York Convention. It was also suggested that any model legislation that might be prepared with respect to the formation of the arbitration agreement might include a provision along the lines of article 7 of the United Nations Convention on Contracts for the International Sale of Goods to facilitate interpretation by reference to internationally accepted principles.

349. Yet another view was that an intermediary solution should be sought to avoid both the alleged dangers of revisiting the New York Convention and the possible inconvenience of relying merely on progressive harmonization through model legislation and case law interpretation. It was thus suggested that consideration might be given to preparing a convention separate from the New York Convention to deal with those situations which arose outside the sphere of application of the New York Convention, including (but not necessarily limited to) situations where the arbitration agreement failed to meet the form requirement established in article II (2). Some support was expressed in favour of that suggestion. Another view, however, was that experience indicated that the process of adopting and securing widespread ratification of a new convention could take many years, and that meanwhile there would be an undesirable lack of uniformity. It was stated that the suggested approach might be particularly suitable to deal with a number of the above-mentioned specific fact situations that posed serious problems under the New York Convention (see above, para. 346). However, with respect to a number of those situations (e.g. transfer of rights or obligations to non-signing third parties), it was widely felt that the issues at stake went to general questions regarding the substance and validity of the underlying transaction. Accordingly, doubts were expressed as to whether it would be desirable and feasible to attempt to deal with those issues in the context of a set of provisions geared primarily to the formation of the arbitration agreement.

350. With respect to the establishment of priorities, it was stated that, unless it could be envisaged to amend the New York Convention through a protocol or otherwise to prepare provisions in the nature of a treaty, work on the issues arising from article II (2) of the New York Convention should not constitute a priority, since no satisfactory solution was to be expected regarding those issues. Some support was expressed in favour of that view. The widely prevailing view, however, was that the Commission, at the current stage, should recognize that issues of formation of the arbitration agreement should be given a high priority on the programme of future work, and that none of the above-suggested approaches should be ruled out until they had been considered carefully by the Working Group to which the issue would be entrusted (see below, para. 380).

e. Arbitrability (A/CN.9/460, paras. 32-34)

351. It was observed that uncertainties as to whether the subject matter of certain disputes was capable of settlement by arbitration was a matter that caused problems in international commercial arbitration (e.g. where arbitrators or parties, in particular those that were foreigners at the place of arbitration, were not aware that a particular issue was not arbitrable or where the law was unclear and parties and arbitrators were unsure to what extent an issue could be taken up in arbitral proceedings).

352. Views were expressed that it might be useful to include arbitrability in the work programme or at least to refer the topic to the Secretariat for further study. To the

extent that the issue should be considered, the purpose should not be to strive for uniformity, but to stimulate transparency of solutions on that question. Work might be geared, for example, towards formulating a uniform provision setting out three or four issues that were generally considered non-arbitrable and calling upon States to list immediately thereafter any other issues regarded as non-arbitrable by the State.

353. At the same time, concerns were expressed that any national listing of non-arbitrable issues might be counter-productive by being inflexible. It was said that the question of arbitrability was subject to constant development (including through case law) and that some States might find it undesirable to interfere with that development. It was agreed that the topic should be accorded low priority.

d. Sovereign immunity (A/CN.9/460, paras. 35-50)

354. The Commission noted that the matter of State immunity remained under consideration by the International Law Commission, and that the General Assembly, by its resolution 53/98 of 20 January 1999, had decided to establish a working group of the Sixth Committee to consider, at its fifty-fourth session, outstanding substantive issues related to the Draft Articles on Jurisdictional Immunities of States and their Property, which draft articles had been prepared by the International Law Commission.

355. The Commission requested the Secretariat to monitor that work and to report on the outcome of those discussions at an appropriate time.

e. Consolidation of cases before arbitral tribunals (A/CN.9/460, paras.51-61)

356. It was pointed out that consolidation of arbitration cases into a single proceeding was not a novel issue and that it had practical significance in international arbitration, in particular where a number of interrelated contracts or a chain of contracts were entered into. Therefore, it was suggested, it might be useful for the question to be studied further. Views differed, however, as to whether the matter should be given high or low priority. It was also suggested that it might be useful for the Commission to prepare guidelines to assist parties in drafting arbitration agreements that envisaged consolidation of proceedings.

357. Another view was that it would not be realistic to expect to achieve substantive progress in that area at the current stage and that the matter should not be placed on the current work programme. After discussion, it was decided that the topic should be accorded low priority.

f. Confidentiality of information in arbitral proceedings (A/CN.9/460, paras. 62-71)

358. It was pointed out that there were two aspects to the topic of confidentiality of information in arbitral proceedings. One aspect concerned "privacy" of arbitration, reflected in rules, agreements or methods by which the participants in an arbitral proceeding would aim at ensuring that non-participants would not become privy to the proceedings. Another aspect concerned the "duty of confidentiality", i.e. the duty of participants in an arbitration to maintain as confidential matters relating to the arbitral proceedings. It was noted that, whereas issues of privacy had been to some degree covered by arbitration rules, such as the UNCITRAL Arbitration Rules, issues of confidentiality generally had not been addressed to much extent in arbitration rules or national legislation.

359. Some support was given to the topic as one of priority. In support of that view, it was explained that parties involved in arbitral proceedings were becoming increasingly concerned over the absence of any rules in respect of confidentiality. It was felt that it would be useful to study the issues, which were becoming increasingly difficult and thorny. Another view was that, although the topic would merit study, it was not one that should be given high priority by the Commission, because of the absence of any viable solutions. It seemed to some that there was little likelihood of achieving anything more than a rule to the effect that "arbitration is confidential except where disclosure is required by law". The prevailing view was that, albeit interesting, the topic was not of high priority.

g. Raising claims for the purpose of set-off (A/CN.9/460, paras. 72-79)

360. It was explained that sometimes in an arbitral proceeding the respondent would invoke a claim that the respondent would have against the claimant, not as a counter-claim, but as a defence for the purpose of a set-off. It was noted that, whereas it was often assumed that a claim raised for the purpose of a set-off had to be covered by the arbitration agreement, there existed rules (such as the International Arbitration Rules of the Zurich Chamber of Commerce, article 27) that were less restrictive in that they provided that the arbitral tribunal also had jurisdiction over

a set-off defence even if the claim that was set off did not fall under the arbitration clause.

361. Views were expressed that it was generally regarded as a sound rule that an arbitral tribunal could take up a claim only if the claim was covered by the arbitration agreement and that, therefore, the consideration of the matter was unlikely to be productive. It was agreed that the topic should be accorded low priority.

h. Decisions by "truncated" arbitral tribunals (A/CN.9/460, paras. 80-91)

362. It was observed that, if, during arbitral proceedings before a three-member tribunal, one of the members should resign out of bad faith, perhaps in collusion with one of the parties, it might be unfair to delay proceedings in order to permit replacement of that arbitrator, and that in some cases the remaining two arbitrators should be able to continue the proceedings and decide the case as a "truncated" tribunal. It was noted that the later in the proceedings such resignation would occur, the more grave could be the problems and loss of resources. It was noted that some arbitration rules (as noted in document A/CN.9/460) permitted, under certain circumstances, awards to be made by truncated tribunals.

363. Views were expressed that the matter deserved further study by the Secretariat and should be considered by the Commission. Some spoke in favour of dealing with the matter on the level of arbitration rules, while others thought that a model legislative provision might also be envisaged. It was noted that solutions in arbitration rules already existed and that examples of legislative solutions existed as well. Another view was that in practice a truncated tribunal would come about only rarely. It was felt that it would be inadvisable to attempt to legislate on that matter because it raised sensitive issues, because it had implications in the context of recognition and enforcement of an award made by a truncated tribunal, and because agreed solutions would be difficult to achieve. It was pointed out that truncated tribunals had acted even in the absence of express rules. In these circumstances, it was agreed that the topic should be accorded low priority.

i. Liability of arbitrators (A/CN.9/460, paras. 92-100)

364. It was noted that the national laws that contained provisions on this topic generally fell into one of two categories. In one group of laws, the focus was on circumscribing the liability of arbitrators, as well as, in some cases, other participants (in some States of that group, arbitrators were considered similar to judges and were afforded similar immunities). In the other group, the approach was to describe the standard of liability (in some of those countries, arbitrators were considered akin to hired professionals and were held to similar standards of liability as other professionals). In many countries, the matter was left unlegislated.

365. The view was expressed that the topic was worthy of further study; it was said that, as there were many countries that did not have legislation on the matter, it would be valuable if the Commission would provide model solutions.

366. Another view was that, in light of different approaches in legal systems, the matter should not be considered by the Commission because it was unlikely that a consensus could be achieved on a workable solution. By addressing the topic and not being able to reach a solution, the Commission would unnecessarily raise its profile and cause confusion. It was agreed that the topic (which should more appropriately be described as "immunity of arbitrators from liability") should be accorded low priority.

j. Power by the arbitral tribunal to award interest (A/CN.9/460, paras. 101-106)

367. It was noted that the power of the arbitral tribunal to award interest was a matter of great practical importance that arose often and potentially involved large amounts of money. It was also noted that the matter involved the question of the power of the arbitral tribunal to award interest (which in some legal systems, it was said, was not implied failing agreement of the parties) as well as rules (largely pertaining to the law applicable to the substance of the dispute) on related issues such as those mentioned in paragraph 106 of document A/CN.9/460.

368. The view was expressed that the topic was important, that it could benefit from further study and that the absence of a model legislative provision was a problem, in particular where the absence of a legislative provision would prevent the arbitral tribunal from being able to award interest.

369. Another view was that, while the topic deserved to be studied at some future time, it was not of high priority, in particular because such matters were ordinarily addressed in the contract and should be left for the parties to determine. It was said, however, that providing guidance

and model solutions would facilitate arbitration. It was noted that, according to Islamic law, interest was proscribed, but that that fact did not prevent finding solutions appropriate for other legal systems. It was agreed that the topic should be accorded low priority.

k. Costs of arbitral proceedings (A/CN.9/460, paras. 107-114)

370. It was widely considered that the question of various matters relating to the costs of arbitration was not urgent. Provisions on costs were included in many arbitration rules and otherwise were best left to the agreement of the parties. It was agreed that the topic should be accorded low priority.

l. Enforceability of interim measures of protection (A/CN.9/460, paras. 115-127)

371. It was generally agreed in the Commission that the question of enforceability of interim measures of protection issued by an arbitral tribunal was of utmost practical importance and in many legal systems was not dealt with in a satisfactory way. It was considered that solutions to be elaborated by the Commission on that topic would constitute a real contribution to the practice of international commercial arbitration. It was agreed that the issue should be addressed through legislation. While suggestions were made that a convention was the appropriate vehicle for dealing with this matter, support was also expressed for the suggestion that model legislation be prepared.

372. As to the substance of future work, several observations and suggestions were made. One was that, in addition to the enforcement of interim measures of protection in the State where the arbitration took place, enforcement of those measures outside that State should also be considered. It was said that, while the possible objective of future work was to make interim measures of protection enforceable in a similar fashion as arbitral awards, it should be borne in mind that interim measures of protection in some important respects differed from arbitral awards (e.g. an interim measure might be issued *ex parte*, and might be reviewed by the arbitral tribunal in light of supervening circumstances). As to *ex parte* measures, it was observed that under some legal systems they could only be issued for a limited period of time (e.g. 10 days), and a hearing had to be held thereafter to reconsider the measure. Court assistance to arbitration (in the form of interim measures of protection issued by a court before the commencement of, or during, arbitral proceedings) was also suggested for study.

373. It was agreed that the topic should be accorded high priority.

m. Possible enforceability of an award that has been set aside in the State of origin (A/CN.9/460, paras. 128-144)

374. It was generally agreed that cases of enforcement of an award that had been set aside in the State of origin, while rare, were potentially a source of serious concern; they gave rise to polarized views, and, if harmonized solutions were not found, could adversely affect the smooth functioning of international commercial arbitration. Therefore, it was considered necessary that the Commission place that topic on its agenda and entrust a working group with exploring various possible solutions. Without fully discussing the merits of possible solutions, several were mentioned.

375. One solution was to distinguish between standards for setting aside an award that were recognized internationally and standards that were not recognized internationally; that solution could be inspired by article IX of the European Convention on International Commercial Arbitration (Geneva, 1961). Another solution could be to prepare provisions supplementing and clarifying article VII of the New York Convention, according to which a party might seek enforcement of a foreign arbitral award in a State other than where the award was made on the basis of provisions of law that were more favourable than those of the New York Convention. A view was expressed that yet another solution would be to disregard, for the purposes of enforcement, the sole fact that the award had been set aside. The possible usefulness of the Commission issuing a statement of principles was also noted.

376. It was agreed that the topic should be accorded high priority.

n. Review and possible revision of the 1961 European Convention on International Commercial Arbitration

377. As regards the current review and possible future revision of the European Convention on International Commercial Arbitration (concluded in 1961 at Geneva

under the auspices of the Economic Commission for Europe (ECE)), as referred to in the note by the Secretariat (A/CN.9/460, para. 6), UNCITRAL heard statements by the observer for ECE and the two Vice-Chairpersons of the ad hoc informal working group (the WP.5 Arbitration Convention Working Group) established for that purpose by the Economic Commission for Europe Working Party on International Contract Practices in Industry (WP.5). UNCITRAL was informed that the WP.5 Arbitration Convention Working Group was expected to review the 1961 European Convention in order to determine its continuing usefulness, its utility beyond that of existing conventions and the advisability of revising that Convention with a view to increasing its utility for existing and potential new signatories (and possible worldwide acceptance), as well as to report on current problems in international arbitration and provide suggestions as to how those problems might be addressed, and by which organization. UNCITRAL was invited to consider undertaking that work jointly with ECE, in compliance with its mandate of coordination and cooperation, and in order to avoid duplication of efforts.

378. UNCITRAL agreed that wasteful duplication of efforts should be avoided. For that reason, and in order to prevent inconsistent results, close coordination and cooperation were considered highly desirable. In order to determine the best ways of achieving those objectives, due account had to be taken of the composition and mandate of the organizations involved. In this context, it was noted that all European and the few non-European States members of ECE were either members of UNCITRAL or could actively participate in its deliberations; that UNCITRAL was the core legal body within the United Nations system in the field of international trade law; and that the subject matter of international commercial arbitration was a global issue best addressed by UNCITRAL. It was also noted that any particular issues of concern primarily or exclusively to a given region would be more appropriately dealt with by the relevant regional organization.

379. As a consequence, UNCITRAL appealed to ECE, in particular its Committee for Trade, Industry and Enterprise Development when defining the mandate of the WP.5 Arbitration Convention Working Group, to concentrate on questions specific to its region or to the functioning of the 1961 European Convention (e.g. article IV and the accompanying mechanism), while exercising restraint as regards arbitration issues of general interest or concern, which were likely to be addressed by the UNCITRAL Working Group on Arbitration. UNCITRAL requested its secretariat to assist, within existing resources, the ECE Working Group in such an undertaking. It was agreed that the concrete steps to be taken in ensuring future cooperation between the two organizations would need to be tailored according to the developments in both projects.

D. Conclusion

380. The Commission, having concluded the discussion and exchange of views on its future work in the area of international commercial arbitration, decided to entrust the work to a working group and requested the Secretariat to prepare the necessary studies. It was agreed that the priority items for the working group should be conciliation (see above, paras. 340-343), requirement of written form for the arbitration agreement (see above, paras. 344-350), enforceability of interim measures of protection (see above, paras. 371-373) and possible enforceability of an award that had been set aside in the State of origin (see above, paras. 374-375). It was expected that the Secretariat would prepare the necessary documentation for the first session of the working group for at least two, and possibly three, of those four topics. As to the other topics discussed in document A/CN.9/460, as well as topics for possible future work suggested at the thirty-second session of the Commission (see above, para. 339), which were accorded lower priority, the working group was to decide on the time and manner of dealing with them.

Chapter VII

Possible future work on insolvency law

381. The Commission had before it a proposal by Australia (A/CN.9/462/Add.1) on possible future work in the area of insolvency law. The proposal referred to recent regional and global financial crises and the work undertaken in international forums in response to those crises. Reports from those forums stressed the need to strengthen the international financial system in three areas: transparency; accountability; and management of international financial crises by domestic legal systems. According to those reports, strong insolvency and debtor-creditor regimes were an important means for preventing

or limiting financial crises and for facilitating rapid and orderly financial restructuring in case of excessive indebtedness. The proposal before the Commission recommended that, in view of its universal membership, its previous successful work on cross-border insolvency and its established working relations with international organizations that had expertise and interest in the law of insolvency, the Commission was an appropriate forum to put insolvency law on its agenda. The proposal urged that the Commission consider entrusting a working group with the development of a model law on corporate insolvency to foster and encourage the adoption of effective national corporate insolvency regimes.

382. The Commission expressed its appreciation for the proposal. It noted that different work projects had been undertaken by other international organizations such as the International Monetary Fund, the World Bank and the International Bar Association on the development of standards and principles for insolvency regimes. It noted that the broad objective of those organizations, while differing in scope and working methods as a consequence of their respective mandates and membership, was to modernize insolvency practices and laws. The initiatives taken in those organizations were proof of the necessity of assisting States in reassessing their insolvency laws and practices. Those various initiatives, however, were also in need of strengthened coordination, where appropriate, so as to avoid inefficient duplication of work and achieve consistent results.

383. Recognition was expressed in the Commission for the importance to all countries of strong insolvency regimes. The view was expressed that the type of insolvency regime that a country had adopted had become a "front-line" factor in international credit ratings. Concern was expressed, however, about the difficulties associated with work at an international level on insolvency legislation, which involved sensitive and potentially diverging socio-political choices. In view of those difficulties, it was feared that the work might not be brought to a successful conclusion. It was said that a universally acceptable model law was in all likelihood not feasible, and that any work needed to take a flexible approach that would leave options and policy choices open to States. While the Commission heard expressions of support for such flexibility, it was generally agreed that the Commission could not take a final decision on committing itself to establishing a working group to develop model legislation or another text without further study of the work already being undertaken by other organizations and consideration of the relevant issues.

384. To facilitate that further study, the Commission was invited by the Secretariat to consider the possibility of devoting one session of a working group to ascertaining what, in the current landscape of efforts, would be an appropriate product (such as a model law, model provisions, a set of principles or other text) and to defining the scope of the issues to be included in that product. Diverging views were expressed in response. One view was that more background work should be undertaken by the Secretariat and presented to the Commission at its thirty-third session for a decision as to whether substantive work of elaborating a uniform law or another text of a recommendatory nature should be undertaken. Another view was that the question could be referred to one session of a working group, for the purpose of exploring those various issues, with a report to be made to the Commission at its thirty-third session in 2000 on the feasibility of undertaking work in the field of insolvency. At that time, the Commission would have before it sufficient information to make a final decision on that issue. It was emphasized that preparatory work for the session of the working group would require coordination with other international organizations already undertaking work in the area of insolvency law, since the results of their work would constitute important elements in the deliberations towards recommending to the Commission what it might usefully contribute in that area. It was pointed out that the importance and urgency of work on insolvency law had been identified in a number of international organizations, and there was wide agreement that more work was required in order to foster the development and adoption of effective national corporate insolvency regimes.

385. The prevailing view in the Commission was that an exploratory session of a working group should be convened to prepare a feasibility proposal for consideration by the Commission at its thirty-third session. Subsequently, after the Commission had discussed its future work in the area of arbitration (see para. 380), it was decided that the Working Group on Insolvency Law was to hold that exploratory session at Vienna from 6 to 17 December 1999.

Chapter VIII

Case law on UNCITRAL texts

386. The Commission noted, with appreciation, the ongoing work under the system that was established for the collection and dissemination of case law on UNCITRAL texts (CLOUT). It was noted that CLOUT was an important means to promote the uniform interpretation and application of UNCITRAL texts by enabling interested persons, such as judges, arbitrators, lawyers or parties to commercial transactions, to take decisions and awards of other jurisdictions into account when rendering their own judgements or opinions or adjusting their actions to the prevailing interpretation of those texts.

387. The Commission noted the valuable work of the national correspondents in the collection of relevant decisions and arbitral awards and their preparation of case abstracts for compilation and distribution by the Secretariat. It was pointed out, however, that there was a wide disparity in the level of participation by national correspondents, which was reflected both in the extent of reporting and in the quality of abstracts prepared. It was noted that improvements in these two areas would significantly improve the reliability of the CLOUT system and would reduce the need for major revisions by the Secretariat.

388. It was also noted that, whereas 58 jurisdictions had appointed national correspondents, there were another 30 jurisdictions that had not yet done so. These jurisdictions would be entitled to make such an appointment either by virtue of their being a party to an UNCITRAL convention currently in force or by having adopted legislation based on an UNCITRAL model law. Noting the importance of uniform reporting from all jurisdictions, the Commission urged States that had not yet done so to appoint a national correspondent. It also urged Governments to assist their national correspondents to the extent possible in their work.

389. It was further noted that the number of States adhering to conventions or enacting legislation based on model laws elaborated by the Commission had increased significantly, and so was the caseload arising under those texts. Strong concern was expressed as to the resultant increase of the workload for the secretariat of the Commission which was unable to bear that load much longer without a significant staff increase.

Chapter IX

Training and technical assistance

390. The Commission had before it a note by the Secretariat (A/CN.9/461) setting forth the activities undertaken since the previous session and indicating the direction of future activities being planned, particularly in light of the increase in the requests received by the Secretariat. It was noted that training and technical assistance activities were typically carried out through seminars and briefing missions, which were designed to explain the salient features of UNCITRAL texts and the benefits to be derived from their adoption by States.

391. It was reported that since the previous session, the following seminars and briefing missions had been held: Lusaka (20-22 April 1998); Yaoundé (27 April 1998); Douala, Cameroon (28-30 April); Manama (12-13 May 1998); La Paz (18 May 1998); Cochabamba, Bolivia (20 May 1998); Santa Cruz, Bolivia (22 May 1998); Lima (25-29 May 1998); Baku (24-25 September 1998); Ulaanbaatar (21-23 October 1998); Beijing (26-30 October 1998); Bucharest (29-30 October 1998); Sofia (2-3 November 1998); Shanghai, China (4-6 November 1998); Sao Paulo, Brazil (16 November 1998); Brasilia (19-20 November 1998); Caracas (24-27 November 1998); Buenos Aires (30 November-1 December 1998); Guatemala City (11-12 March 1999); Mexico City (15-17 March 1999); Monterrey, Nuevo Leon, Mexico (20 March 1999). The secretariat of the Commission reported that a number of requests had to be turned down for lack of sufficient resources, and that for the remainder of 1999, only a part of the requests, made by countries in Africa, Asia, Latin America and eastern Europe, could be met.

392. The Commission expressed its appreciation to the Secretariat for the activities undertaken since its past session and emphasized the importance of the training and technical assistance programme for promoting awareness and wider adoption of the legal texts it had produced. It was pointed out that training and technical assistance was particularly useful for developing countries lacking expertise in the areas of trade and commercial law covered by the work of UNCITRAL. It was also observed that the training and technical assistance activities of the Secretariat could play an important role in the economic integration efforts being undertaken by many countries.

393. The Commission noted the various forms of technical assistance that might be provided to States preparing legislation based on UNCITRAL texts, such as review of preparatory drafts of legislation from the point of view of UNCITRAL texts, preparation of regulations implementing such legislation and comments on reports of law reform commissions, as well as briefings for legislators, judges, arbitrators, procurement officials and other users of UNCITRAL texts as embodied in national legislation. The upsurge in commercial law reform, it was noted, represented a crucial opportunity for the Commission to significantly further the objectives of substantial coordination and acceleration of the process of harmonization and unification of international trade law, as envisaged by General Assembly resolution 2205 (XXI) of 17 December 1966.

394. The Commission took note with appreciation of the contributions made by Finland, Greece and Switzerland towards the seminar programme. It also expressed its appreciation to Cambodia, Kenya and Singapore for their contributions to the Trust Fund for Granting Travel Assistance to Developing States members of UNCITRAL. The Commission also expressed its appreciation to those other States and organizations which had contributed to the Commission's programme of training and assistance by providing funds or staff or by hosting seminars. Stressing the importance of extrabudgetary funding for carrying out training and technical assistance activities, the Commission appealed once more to all States, international organizations and other interested entities to consider making contributions to the UNCITRAL trust funds so as to enable the secretariat of the Commission to meet the increasing demands in developing countries and newly independent States for training and assistance, and delegates from developing countries to attend UNCITRAL meetings. It was also suggested that, in order to redress the resource difficulties facing the Commission, an attempt be made to encourage the private sector to contribute to the financing of the UNCITRAL assistance and training programme, particularly in view of the fact that the private sector benefited a great deal from the overall work of the Commission in the area of international trade law.

395. In view of the limited resources available to the secretariat of the Commission, whether from budgetary or extrabudgetary resources, strong concern was expressed that the Commission could not fully implement its mandate with regard to training and technical assistance. Concern was also expressed that, without effective cooperation and coordination between development assistance agencies providing or financing technical assistance and the Secretariat, international assistance might lead to the adoption of national laws that would not represent internationally agreed standards, including UNCITRAL conventions and model laws.

396. As to the internship programme of the secretariat of the Commission, concern was expressed that the majority of the participants were nationals of developed countries. An appeal was made to all States to consider supporting programmes that sponsored the participation of nationals of developing countries in the internship programme.

397. In order to ensure the effective implementation of its training and assistance programme and the timely publication and dissemination of its work, the Commission decided to recommend to the General Assembly to request the Secretary-General to substantially increase both the human and financial resources available to its secretariat.

Chapter X

Status and promotion of UNCITRAL texts

398. The Commission, on the basis of a note by the Secretariat (A/CN.9/462), considered the status of the conventions and model laws emanating from its work, as well as the status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). The Commission noted with pleasure the new actions of States and jurisdictions after 12 June 1998 (date of the conclusion of the thirty-first session of the Commission) regarding the following instruments:

(a) *Convention on the Limitation Period in the International Sale of Goods, concluded at New York on 14 June 1974, as amended by the Protocol of 11 April 1980*. Number of States parties: 17;

(b) *[Unamended] Convention on the Limitation Period in the International Sale of Goods (New York, 1974)*. New action by Burundi; number of States parties: 24;

(c) *United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules)*. New action by Burundi; number of States parties: 26;

(d) *United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)*. New actions by Burundi, Croatia, Kyrgyzstan, Peru and Uruguay; number of States parties: 56;

(e) *United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988)*. The Convention has two States parties. It requires eight more adherences for entry into force;

(f) *United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991)*. New action by Egypt; the Convention has two States parties. It requires three more adherences for entry into force;

(g) *United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995)*. New actions by El Salvador, Kuwait and Tunisia; the Convention has five States parties. It will enter into force on 1 January 2000;

(h) *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*. New actions by the Lao People's Democratic Republic, Lebanon, Mozambique, Oman and the Republic of Moldova; number of States parties: 121;

(i) *UNCITRAL Model Law on International Commercial Arbitration, 1985*. New jurisdictions that have enacted legislation based on the Model Law: Macau;

(j) *UNCITRAL Model Law on International Credit Transfers, 1992*;

(k) *UNCITRAL Model Law on Procurement of Goods, Construction and Services, 1994*;

(l) *UNCITRAL Model Law on Electronic Commerce, 1996*. New jurisdictions that have enacted legislation based on the Model Law: Republic of Korea, Singapore and, within the United States of America, Illinois;

(m) *UNCITRAL Model Law on Cross-Border Insolvency, 1997*.

399. Appreciation was expressed for those legislative actions on the texts of the Commission. A request was directed to States that had enacted or were about to enact a model law prepared by the Commission, or were considering legislative action regarding a convention resulting from the work of the Commission, to inform the secretariat of the Commission thereof. Such information would be useful to other States in their consideration of similar legislative actions. Appreciation was also expressed to the Secretariat for establishing a Web site for UNCITRAL documents, past and current. Noting the difficulties faced by the Secretariat in posting UNCITRAL documents on its Web site in all official languages in a timely fashion, it was agreed that the resources available to the Secretariat for that purpose needed to be substantially increased.

400. Representatives and observers of a number of States reported that official action was being considered with a view to adherence to various conventions and to the adoption of legislation based on various model laws prepared by UNCITRAL. It was noted that the UNCITRAL Model Law on Electronic Commerce had become the single common source often cited by many countries. The view was expressed that the recent endorsement by the International Chamber of Commerce Banking Commission would likely boost ratification of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit.

401. It was noted that, despite the universal relevance and usefulness of those texts, a number of States had not yet enacted any of them. An appeal was directed to the representatives and observers that had been participating in the meetings of the Commission and its working groups to contribute, to the extent that they in their discretion deemed appropriate, to facilitating consideration by legislative organs in their countries of texts of the Commission. It was suggested that the publication of articles in law journals and the holding of conferences to discuss UNCITRAL texts could usefully serve that purpose. It was also suggested that consideration of an UNCITRAL text by legislative organs could be facilitated by bringing to the attention of the secretariat of the Commission any concern that might be expressed with regard to such text in order that such concern might be addressed.

Chapter XI

General Assembly resolutions on the work of the Commission

402. The Commission took note with appreciation of General Assembly resolution 53/103 of 8 December 1998, in which the Assembly commended the Commission for the progress made in its work on receivables financing, electronic commerce, privately financed infrastructure

projects and the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). In addition, the Commission took note with appreciation of paragraph 3 of that resolution, in which the Assembly commended the Commission for holding a special commemorative "New York Convention Day" in order to celebrate the fortieth anniversary of that Convention.

403. The Commission also noted with appreciation that, in paragraph 4 of resolution 53/103, the General Assembly appealed to Governments that had not yet done so to reply to the questionnaire circulated by the Secretariat in relation to the legal regime governing the recognition and enforcement of foreign arbitral awards.

404. In addition, the Commission noted that, in paragraph 6 of resolution 53/103, the General Assembly reaffirmed the mandate of the Commission, as the core legal body within the United Nations system in the field of international trade law, to coordinate legal activities in that field, and, in that connection, called upon all bodies of the United Nations system and invited other international organizations to bear in mind the mandate of the Commission and the need to avoid duplication of effort and to promote efficiency, consistency and coherence in the unification and harmonization of international trade law, and recommended that the Commission, through its secretariat, continue to maintain close cooperation with the other international organs and organizations, including regional organizations, active in the field of international trade law.

405. The Commission took note with appreciation of the decision of the General Assembly, in paragraph 7 of resolution 53/103, to reaffirm the importance, in particular for developing countries, of the work of the Commission concerned with training and technical assistance in the field of international trade law, such as assistance in the preparation of national legislation based on legal texts of the Commission, and that, in paragraph 8, the Assembly expressed the desirability for increased efforts by the Commission, in sponsoring seminars and symposia, to provide such training and assistance.

406. The Commission further noted with appreciation the appeal by the General Assembly, in paragraph 8 (b) of resolution 53/103, to Governments, the relevant United Nations organs, organizations, institutions and individuals to make voluntary contributions to the UNCITRAL Trust Fund for Symposia and, where appropriate, to assist the secretariat of the Commission in the financing and organizing of seminars, particularly in developing countries, and in the award of fellowships to candidates from developing countries to enable them to participate in such seminars and symposia. Furthermore, it was noted that the Assembly appealed, in paragraph 9 of the resolution, to the United Nations Development Programme and other bodies responsible for development assistance, such as the World Bank and the European Bank for Reconstruction and Development, as well as to Governments in their bilateral aid programmes, to support the training and technical assistance programme of the Commission and to cooperate and coordinate their activities with those of the Commission.

407. It was also appreciated that the General Assembly, in paragraph 10 of resolution 53/103, appealed to Governments, the relevant United Nations organs, organizations, institutions and individuals, in order to ensure full participation by all Member States in the sessions of the Commission and its working groups, to make voluntary contributions to the Trust Fund for Granting Travel Assistance to Developing States members of UNCITRAL, at their request and in consultation with the Secretary-General. (That trust fund had been established pursuant to General Assembly resolution 48/32 of 9 December 1993.) The Commission noted with appreciation the decision of the General Assembly, in paragraph 11, to continue, in the competent Main Committee during the fifty-third session of the General Assembly, its consideration of granting travel assistance to the least developed countries that were members of the Commission, at their request and in consultation with the Secretary-General.

408. The Commission welcomed the request by the General Assembly, in paragraph 12 of the resolution, to the Secretary-General to ensure the effective implementation of the programme of the Commission. The Commission, in particular, hoped that the secretariat of the Commission would be allocated sufficient resources to meet the increased demands for training and assistance. The Commission noted with regret that, despite the above-mentioned request of the Assembly, the secretariat of the Commission was generally short of funds. As a consequence, the secretariat was unable to publish the *UNCITRAL Yearbook* and brochures containing texts resulting from the work of the Commission and was unable to meet all requests made for technical assistance.

409. The Commission noted with appreciation that the General Assembly, in paragraph 13 of resolution 53/103, stressed the importance of bringing into effect the conventions emanating from the work of the Commission,

and that, to that end, the Assembly urged States that had not yet done so to consider signing, ratifying or acceding to those conventions.

Chapter XII

Coordination and cooperation

A. Transport law

410. It was recalled that, the Commission, during its twenty-ninth session in 1996, while not having included the consideration of issues of transport law on its current agenda, decided that the Secretariat should be the focal point for gathering information, ideas and opinions as to the problems in transport law that arose in practice and possible solutions to those problems. Such information-gathering should be broadly based and should include among its sources, in addition to Governments, international organizations representing the commercial sectors involved in the carriage of goods by sea, such as the Comité maritime international (CMI), the International Chamber of Commerce, the International Union of Marine Insurance, the International Federation of Freight Forwarders' Associations, the International Chamber of Shipping and the International Association of Ports and Harbours.[28]

411. At its thirty-first session in 1998, the Commission heard a statement on behalf of CMI to the effect that it welcomed the invitation to cooperate with the Secretariat in soliciting views of the sectors involved in the international carriage of goods and in preparing an analysis of that information. That analysis would allow the Commission to take an informed decision as to the desirable course of action.[29]

412. Strong support had been expressed at that session by the Commission for the exploratory work being undertaken by CMI and the secretariat of the Commission. The Commission expressed its appreciation to CMI for its willingness to embark on that important and far-reaching project, for which few or no precedents existed at the international level; the Commission was looking forward to being apprised of the progress of the work and to considering the opinions and suggestions resulting from it.[30]

413. At the current session, it was reported on behalf of CMI that the Assembly and the Executive Council of CMI had welcomed the initiative to collect data on issues related to international transport law that had so far not been internationally harmonized, and that a CMI working group had been instructed to prepare a study on a broad area of issues in international transport law with the aim of identifying the areas where unification or harmonization were needed by the industries involved. In undertaking the study, it had been realized that the industries involved were extremely interested in pursuing the project and had offered their technical and legal knowledge to assist in that endeavour. Based on that favourable reaction and the preliminary findings by the CMI working group, it appeared that further harmonization in the field of transport law would greatly benefit international trade. The working group had found a number of issues that had not been covered by the current unifying instruments. Some of the issues were regulated by national laws which, however, were not internationally harmonized. Evaluated in the context of electronic commerce, that lack of harmonization became even more significant. It was also reported that the working group had identified numerous interfaces between the different types of contracts involved in international trade and transport of goods (such as sales contracts, contracts of carriage, insurance contracts, letters of credit, freight forwarding contracts, as well as a number of other ancillary contracts). The working group intended to clarify the nature and function of those interfaces and to collect and analyse the rules currently governing them. That exercise would at a later stage include a re-evaluation of principles of liability as to their compatibility with a broader area of rules on the carriage of goods.

414. It was further reported that the CMI working group had launched an investigation by means of a questionnaire addressed to all CMI member organizations covering a great number of legal systems. At the same time, international organizations involved and interested in international transport had been invited to a meeting to be held on 30 June 1999 in London, where particular issues of interest to those organizations would be discussed and added to the agenda of the working group.

415. The intention of CMI was, once the replies to the questionnaire had been received, to create an international subcommittee of CMI with a view to analysing the data and finding a basis for further work towards harmonizing the law in the area of international transport of goods. It was stated that the enthusiasm encountered so far in the industry and the provisional findings about the areas of law that needed further harmonization made it likely that the

project would be eventually transformed into a universally acceptable harmonizing instrument. The Commission was assured that CMI would provide the Commission with its assistance in preparing such an instrument.

416. Expressing its appreciation to the Commission for the close cooperation with CMI in the area of transport law, the representative of CMI spoke of the need for a creative exchange of ideas among experts from different sectors interested in the carriage of goods, from different legal systems and from countries at different levels of development. In that connection, it was recalled that the Commission had on several occasions organized colloquia (such as the New York Convention Day on 10 June 1998 during the thirty-first session of the Commission in 1998), and it was suggested that it would be useful to carry out such an exchange of ideas at a broadly based colloquium, organized during the annual session of the Commission in 2000.

417. In reacting to the report on behalf of CMI, statements of gratitude were made to CMI for the work carried out so far; interest was expressed in the announced study that went beyond the liability of carriers and that would examine the interdependence among various contracts involved in the international carriage of goods and the need to provide legal support to modern contract and transport practices. It was said that increasing disharmony in the area of international carriage of goods was a source of concern and that, in order to provide a certain legal basis to modern contract and transport practices, it was necessary to look beyond the liability issues and, if need be, reconsider positions taken in the past. Furthermore, it was said that various regional initiatives in the area of transport law ought to be examined and borne in mind in any future work in that area of law.

418. The Commission expressed its appreciation to CMI for having acted upon its request for cooperation, and it requested the Secretariat to continue to cooperate with CMI in gathering and analysing information. The Commission was looking forward to receiving a report at a future session presenting the results of the study with proposals for future work.

B. Asian-African Legal Consultative Committee

419. It was stated on behalf of the Asian-African Legal Consultative Committee (AALCC) that the Committee, at its annual sessions, was considering reports on the work of UNCITRAL. AALCC welcomed the Commission's work on privately financed infrastructure projects, took note with appreciation of the substantive progress of the Commission's work towards a draft Convention on Assignment in Receivables Financing, supported the Commission's ongoing work on electronic commerce and reiterated AALCC support for ongoing work in the field of arbitration within the context of the Commission. The Commission was informed of the resolution made at the 1999 session of AALCC mandating the Secretary-General of AALCC to explore the possibilities of convening a seminar or workshop in 1999 in cooperation with UNCITRAL and the United Nations Conference on Trade and Development. The Commission expressed its appreciation for the statement and welcomed all the efforts aimed at strengthening cooperation with AALCC.

C. International Institute for the Unification of Private Law

420. The Commission was informed that, beyond the draft Convention on International Interests in Mobile Equipment, the following items were on the agenda of the International Institute for the Unification of Private Law (Unidroit): franchising, questions of electronic commerce relating to the Convention on the Contract for the International Carriage of Goods by Road, revising and expanding the Unidroit Principles on International Commercial Contracts and transnational aspects of civil procedure. It was observed that a study group was considering the preparation of a legal guide on international franchising. It was also pointed out that another study group was considering revising or supplementing the Convention on the Contract for the International Carriage of Goods by Road with a view to ensuring that it sufficiently accommodated electronic means of communication. With regard to the Unidroit Principles on International Commercial Contracts, it was stated that they were being revised with a view to addressing matters such as agency, assignment, rights of set-off and limitation of actions. As to civil procedure, it was said that, with the cooperation of the American Law Institute, a study group was considering national rules of civil procedure that were common to many legal systems and could serve as a basis for a body of transnational rules of procedure.

421. The Commission welcomed cooperation with Unidroit. It was felt that such cooperation was necessary for the optimal use of the resources available to the respective organizations to the benefit of law unification.

Chapter XIII

Other business

A. Request for endorsement of International Standby Practices and of Uniform Rules for Contract Bonds

422. The Commission had before it a note containing a request by the Institute of International Banking Law and Practice that the Commission consider recommending for worldwide use the Rules on International Standby Practices (ISP98), as endorsed by the Commission on Banking Technique and Practice of the International Chamber of Commerce. The Commission was also notified of a request from the Secretary-General of the International Chamber of Commerce that the Commission consider giving its formal recognition and endorsement of the Uniform Rules for Contract Bonds (URCB). In order to allow consideration of those requests, the Commission had before it the text of ISP98 (A/CN.9/459) and of URCB (A/CN.9/459/Add.1).

423. It was recalled that the Commission had endorsed INCOTERMS 1990 at its twenty-fifth session, in 1992,[31] and the Uniform Customs and Practice for Documentary Credits (UCP 500) at its twenty-seventh session, in 1994.[32] Reference was made to the importance of ISP98 as private rules of practice intended to apply to standby letters of credit. It was pointed out that the idea of preparing such rules was conceived during the deliberations of the UNCITRAL Working Group on International Contract Practices which resulted in the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit. The ISP98 Rules were formulated to complement the Convention. The ISP98 drafting process itself was undertaken in regular consultation with the UNCITRAL secretariat and was also used as an opportunity to promote adoption of the Convention. In that context, the Commission noted with particular appreciation that adoption of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit had been recommended to Governments by the Banking Commission of the International Chamber of Commerce.

424. Reference was also made to the importance of URCB as a commendable practical tool and to the need for wider awareness of that instrument.

425. The Commission expressed its appreciation for the efforts that led to the elaboration of those rules of practice and welcomed the requests for their endorsement by the Commission. However, while several delegations indicated their desire to endorse the text of both ISP98 and URCB at the current session, some delegations indicated that, owing to the fact that late publication of document A/CN.9/459 and Add.1 had prevented them from carrying out the consultations required prior to endorsement, they were not prepared to endorse the text of ISP98 and URCB at the current session. The Commission regretfully felt obliged to postpone consideration of endorsement until the next session.

B. Commercial Law Association

426. The Commission recalled that the Commercial Law Association had been established in 1997 as a non-governmental international association and forum for individuals, organizations and institutions to support the work of the Commission. It noted the projects proposed for the Association, in particular, the establishment of a correspondent network to foster the development of, and reporting on, UNCITRAL-related activities around the world; the publication of an annual review containing work relating to UNCITRAL; assistance with both the preparation of UNCITRAL texts through the provision of co-ordinated materials, information and support; the establishment of an internship and senior scholar programme; coordination of law reform efforts with other international organizations and cooperation and joint use of resources; advising the Secretariat of possible topics for future projects; assisting with the CLOUT system; and seeking private sector support for UNCITRAL and its work.

427. The Commission heard with interest the suggestion that, in order to develop those projects and promote better knowledge and understanding of UNCITRAL and its work, a one-day forum should be held in conjunction with the thirty-third session of the Commission in 2000. Such a forum would present an opportunity not only to provide information on the work of the Commission to the international business community, but also to seek the

views of Commission members and the international business community on current work and on possible future subjects.

C. Willem C. Vis International Commercial Arbitration Moot

428. It was reported to the Commission that the Institute of International Commercial Law at Pace University School of Law, New York, had organized the sixth Willem C. Vis International Commercial Arbitration Moot (Vienna, 27 March to 1 April 1999). Legal issues that the teams of students participating in the Moot dealt with were based, *inter alia*, on the United Nations Convention on Contracts for the International Sale of Goods, and UNCITRAL instruments on international commercial arbitration. Some 70 teams from law schools in some 28 countries participated in the 1999 Moot. The Moot involved participation of some 350 law students and the performance of the competing teams was judged by some 180 judges including arbitrators, attorneys, academics and others. The seventh Moot was scheduled to be held in Vienna from 15 to 20 April 2000.

429. The Commission heard the report with interest and appreciation. It regarded the Moot, with its international participation, as an excellent method of teaching international trade law and disseminating information about UNCITRAL texts. The Commission also noted, with appreciation, the contribution of Professor Eric E. Bergsten, former Secretary of the Commission, to the ongoing success of the Moot competition.

D. Bibliography

430. The Commission took note with appreciation of the bibliography of recent writings related to the work of the Commission, which was generally praised as a useful research tool (A/CN.9/463). The Commission appealed to all those interested in the completeness of the bibliography to send to the UNCITRAL Law Library all publications related to the work of the Commission for keeping and inclusion of the information in the bibliography.

E. *UNCITRAL Yearbook* and other UNCITRAL publications

431. The Commission noted that the *UNCITRAL Yearbook* (which appeared in English, French, Russian and Spanish) was published with a delay, and that the delay was for some language versions up to 3 to 4 years. The Commission expressed a serious concern about that fact. It was considered that the *travaux préparatoires* for the UNCITRAL texts, compiled in the *UNCITRAL Yearbook*, were an essential tool used by Governments in considering UNCITRAL texts for adoption, were widely used by judges, arbitrators and other practitioners in interpreting and using the texts of the Commission and were considered as a most useful teaching and research aid by academics and students. It was pointed out that the *UNCITRAL Yearbook* was often the only practical way of obtaining documents of the Commission.

432. Therefore, the Commission appealed to the General Assembly to ensure the effective implementation of the UNCITRAL publication programme and, in particular, the timely publication of the UNCITRAL Yearbook in all the languages envisaged.

F. Date and place of the thirty-third session of the Commission

433. After lengthy discussions, it was decided that the Commission would hold its thirty-third session in New York from 12 June to 7 July 2000. Concern was expressed that a session of such long duration would impose a considerable strain on resources. It was recognized, however, that a four-week session was necessary in view of the expectation that two, or possibly three, draft legal texts would be submitted to the Commission for finalization and adoption.

G. Sessions of working groups

434. The Commission approved the following schedule of meetings for its working groups:

(a) The Working Group on International Contract Practices is to hold its thirty-first session at Vienna from 11 to 22 October 1999. Should the Working Group not be able to conclude its work on the draft Convention on Assignment in Receivables Financing at that session, the Working Group is to hold its thirty-second session in New York from 10 to 21 January 2000;

(b) The Working Group on Electronic Commerce is to hold its thirty-fifth session at Vienna from 6 to 17 September 1999 and its thirty-sixth session in New York from 14 to 25 February 2000;

(c) The Working Group on Insolvency Law is to hold its twenty-second session at Vienna from 6 to 17 December 1999. The Working Group is to hold its twenty-third session at Vienna from 20 to 31 March 2000 under the name of Working Group on Arbitration.

Notes

[1] Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 17 were elected by the General Assembly at its forty-ninth session, on 28 November 1994 (decision 49/315), and 19 at its fifty-second session, on 24 November 1997 (decision 52/314). Pursuant to resolution 31/99 of 15 December 1976, the term of those members elected by the Assembly at its forty-ninth session will expire on the last day prior to the opening of the thirty-fourth session of the Commission, in 2001, while the term of those members elected at the fifty-second session will expire on the last day prior to the opening of the thirty-seventh session of the Commission, in 2004.

[2] The election of the Chairman took place at the 651st meeting, on 17 May 1999, the election of the Vice-Chairmen at the 652nd and 662nd meetings, on 17 and 25 May 1999, respectively, and the election of the Rapporteur at the 654th meeting, on 18 May 1999. In accordance with a decision taken by the Commission at its first session, the Commission has three Vice-Chairmen, so that, together with the Chairman and the Rapporteur, each of the five groups of States listed in General Assembly resolution 2205 (XXI), sect. II, para. 1, will be represented on the bureau of the Commission (see the report of the United Nations Commission on International Trade Law on the work of its first session, *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16* (A/72/16), para. 14 (*Yearbook of the United Nations Commission on International Trade Law*, vol. I: *1968-1970* (United Nations publication, Sales No. E.71.V.1), part two, chap. I, sect. A)).

[3] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17), paras. 225-230.

[4] Ibid., *Fifty-second Session, Supplement No. 17* and corrigendum (A/52/17 and Corr.1), paras. 231-247.

[5] Ibid., *Fifty-third Session, Supplement No. 17* (A/53/17), paras. 12-206.

[6] Ibid., para. 204.

[7] Ibid., paras. 23-49.

[8] Ibid., para. 105.

[9] Ibid., paras. 101 and 102.

[10] Ibid., para. 204.

[11] Ibid., paras. 63-95.

[12] Ibid., paras. 123-130.

[13] Ibid., para. 146.

[14] Ibid., para. 171.

[15] Ibid., paras. 63-95.

[16] Ibid., *Fifty-second Session, Supplement No. 17* and corrigendum (A/52/17 and Corr.1), para. 250, and ibid., *Fifty-third Session, Supplement No. 17* (A/53/17), para. 207.

[17] Ibid., *Fifty-second Session, Supplement No. 17* and corrigendum (A/52/17 and Corr.1), paras. 249 and 250.

[18] Ibid., *Fifty-third Session, Supplement No. 17* (A/53/17), para. 208.

[19] Ibid., para. 209.

[20] Ibid., *Fifty-second Session, Supplement No. 17* and corrigendum (A/52/17 and Corr.1), para. 251, and ibid., *Fifty-third Session, Supplement No. 17* (A/53/17), para. 211.

[21] Ibid., *Forty-eighth Session, Supplement No. 17* (A/48/17), paras. 297-301; ibid., *Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), paras. 208-214; and ibid., *Fiftieth Session, Supplement No. 17* (A/50/17), paras. 374-381.

[22] Ibid., *Fiftieth Session, Supplement No. 17* (A/50/17), paras. 374-381.

[23] Ibid., *Fiftieth Session, Supplement No. 17* (A/50/17), paras. 401-404, and ibid., *Fifty-first Session, Supplement No. 17* (A/51/17), paras. 238-243.

[24] *Enforcing Arbitration Awards under the New York Convention: Experience and Prospects* (United Nations publication, Sales No. E.99.V.2).

[25] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 17* (A/53/17), para. 235.

[26] *International Council for Commercial Arbitration Congress Series No. 9* (forthcoming).

[27] Gerold Herrmann, "Does the world need additional uniform legislation on arbitration?" [to be published in *Arbitration International*, vol. 15 (1999), No. 3.]

[28] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17), paras. 210-215.

[29] Ibid., *Fifty-third Session, Supplement No. 17* (A/53/17), para. 264.

[30] Ibid., para. 266.

[31] Ibid., *Forty-seventh Session, Supplement No. 17* (A/47/17), para. 161.

[32] Ibid., *Forty-ninth Session, Supplement No. 17* (A/49/17), para. 230.

Annex

List of documents before the Commission at its thirty-second session

A. General series

A/CN.9/453	Provisional agenda, annotations thereto and scheduling of meetings of the thirty-second session
A/CN.9/454	Report of the Working Group on Electronic Commerce on the work of its thirty-third session
A/CN.9/455	Report of the Working Group on International Contract Practices on the work of its twenty-ninth session
A/CN.9/456	Report of the Working Group on International Contract Practices on the work of its thirtieth session
A/CN.9/457	Report of the Working Group on Electronic Commerce on the work of its thirty-fourth session
A/CN.9/458	Privately financed infrastructure projects: draft chapters of a legislative guide on privately financed infrastructure projects
A/CN.9/458/Add.1	Introduction and background information on privately financed infrastructure projects
A/CN.9/458/Add.2	Chapter I. General legislative considerations
A/CN.9/458/Add.3	Chapter II. Project risks and government support
A/CN.9/458/Add.4	Chapter III. Selection of the concessionaire
A/CN.9/458/Add.5	Chapter IV. The project agreement
A/CN.9/458/Add.6	Chapter V. Infrastructure development and operation
A/CN.9/458/Add.7	Chapter VI. End of project term, extension and termination
A/CN.9/458/Add.8	Chapter VII. Governing law
A/CN.9/458/Add.9	Chapter VIII. Settlement of disputes
A/CN.9/459	International standby practices (ISP98)
A/CN.9/459/Add.1	Uniform Rules for Contract Bonds (URCB)
A/CN.9/460	International commercial arbitration: possible future work in the area of international commercial arbitration
A/CN.9/461	Training and technical assistance
A/CN.9/462	Status of conventions and model laws
A/CN.9/462/Add.1	Insolvency law: possible future work in the area of insolvency law—Proposal by Australia
A/CN.9/463	Bibliography of recent writings related to the work of UNCITRAL

B. Restricted series

A/CN.9/XXXII/CRP.1 and Add.1-23	Draft report of the United Nations Commission on International Trade Law on the work of its thirty-second session
A/CN.9/XXXII/CRP.2	Proposal by the Republic of Korea
A/CN.9/XXXII/CRP.3	Proposed additions to chapter II by the United States of America